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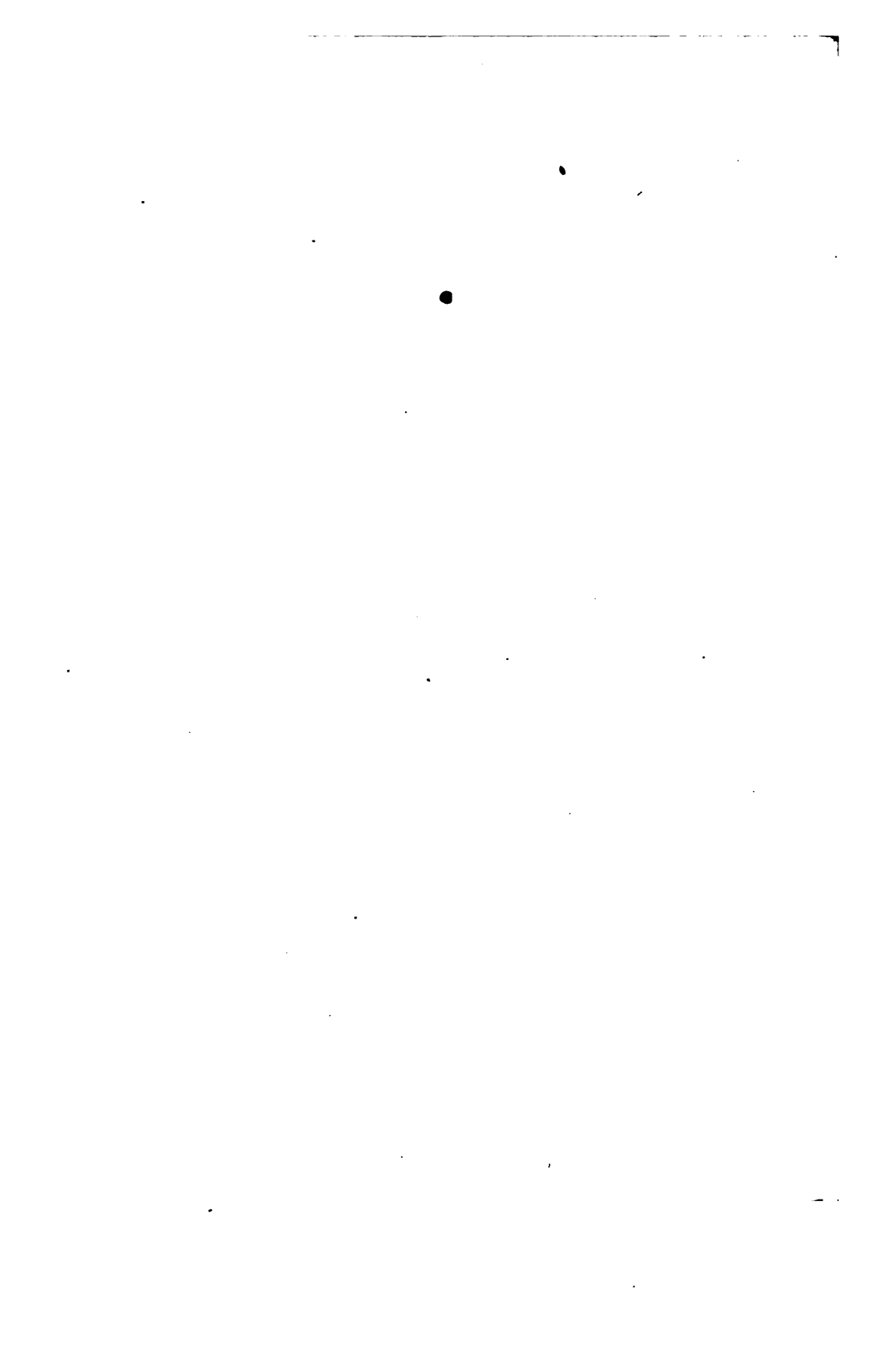
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REPORTS
OF
CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA

**WITH TABLES OF CASES REPORTED AND CITED, TEXT-
BOOKS CITED, STATUTES CITED AND CONSTRUED, AN
INDEX, AND NOTES TO THE REPORTED CASES**

WILL H. ADAMS,
OFFICIAL REPORTER

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ASSISTANTS.

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JUDGES
OF THE
APPELLATE COURT
OF THE
STATE OF INDIANA
DURING THE PERIOD COMPRISED IN THIS VOLUME

HON. JOSEPH G. IBACH ¶*
HON. FRED S. CALDWELL †
HON. ETHAN A. DAUSMAN §
HON. IRA C. BATMAN §
HON. EDWARD W. FELT *
HON. MILTON B. HOTTEL *

¶Chief Judge, November Term, 1917.

†Appointed September 1, 1913, and elected in 1914.

*Elected in 1910 and re-elected in 1914.

§Elected in 1916.

OFFICERS
OF THE
APPELLATE COURT

ATTORNEY-GENERAL,
ELE STANSBURY

REPORTER,
WILL H. ADAMS

CLERK,
P. J. LYNCH

SHERIFF,
GEORGE D. ABRAHAM

LIBRARIAN,
CHARLES E. EDWARDS

CASES DECIDED
IN THE
APPELLATE COURT
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1917, AND MAY TERM,
1918, IN THE ONE HUNDRED SECOND YEAR
OF THE STATE.

PRICE v. STATE OF INDIANA, EX REL. GORDON ET AL.

[No. 9,478. Filed February 21, 1918.]

1. **APPEAL.—Presenting Questions for Review.—Necessity of Exceptions.**—Generally, the failure to save an exception to the ruling of the trial court which is assigned as error on appeal is fatal to such assignment. p. 5.
2. **APPEAL.—Presenting Questions for Review.—Motion to Modify Judgment.**—Generally, a party seeking relief from the form or substance of some part of a judgment rendered against him must first present to the trial court a motion definitely specifying in what respect the judgment should be modified, and, if such motion is overruled, the ruling should be assigned as error to present the question for review on appeal. p. 5.
3. **BASTARDS.—Judgment.—Payment.—Use of Money.**—Under §1026 Burns 1914, §991 R. S. 1881, providing that, if the defendant in a bastardy proceeding, is found to be the father of the child, or shall confess the same, he shall be adjudged the father and stand charged with its maintenance and education, and §1027 Burns 1914, §992 R. S. 1881, providing that the court shall make such order as may seem just for securing the child's maintenance and education, by the annual payment to the mother, or, if she be dead or an improper person to receive the same, to such other person as the court may direct, of such sums of money as may be adjudged proper, the only judgment authorized is one securing the child's maintenance and education, and a judgment in a bastardy proceeding that the defendant pay to the clerk of the court, for the use of a doctor, for a surgical operation, a specified sum, is void. pp. 6, 8.
4. **BASTARDS.—Appeal.—Review of Judgment.—Presumptions.**—Under §1027 Burns 1914, §992 R. S. 1881, relating to the order for

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maintenance in a bastardy proceeding and providing that the money shall be paid to the mother, or, if she be dead or an improper person, to such other person as the court may direct, and §1032 Burns 1914, §1009 R. S. 1881, providing that the death of a bastard shall not be cause for abatement, or bar to any prosecution for bastardy, the court on appeal will not presume, to sustain a judgment in a bastardy proceeding in favor of a third person, that either the mother or child is dead, or that the mother is an improper person to receive payments on such judgment. p. 7.

5. **BASTARDS.**—*Judgment.—Conformance to Statute.—Necessity.*—As a bastardy proceeding is statutory, a judgment which is plainly unauthorized by and contrary to the statute is void. p. 9.
6. **APPEAL.**—*Review.—Void Judgment.*—Where a judgment is void, appellant may obtain relief from it on appeal by a direct assignment of error in the appellate court, even though he made no motion to modify in the trial court, and reserved no exception to the rendition of such judgment. p. 9.

From Grant Circuit Court; *H. J. Paulus*, Judge.

Action by the State of Indiana, on the relation of Florence Gordon and another, against Paul Price. From the judgment rendered, the defendant, by his next friend, appeals. *Reversed.*

John A. Kersey, for appellant.

Evan B. Stotsenburg, Attorney-General, *Leslie R. Naftzger* and *Wilber E. Williams*, for appellees.

FELT, J.—The relatrix Florence Gordon, on April 16, 1915, filed an affidavit against the appellant, in which she alleged that she was pregnant with a bastard child. At a later date the relatrix was examined by the justice of the peace before whom the affidavit was filed and her examination shows that she had been delivered of a bastard child about the last of April, 1915, and that appellant was the father of her child. The findings of the justice of the peace show the same facts, and the case was duly certified to the Grant Circuit Court on June 21, 1915. On October

12, 1915, the circuit court pronounced judgment as follows:

“State of Indiana, ex rel.

Florence Gordon,

vs.

Paul Price.

“Come the parties, by counsel, and this cause being at issue is submitted to the court for trial, without the intervention of a jury, and the court having heard the evidence, and upon the statement of the defendant that he was the father of the bastard child, now finds for the said relatrix that the allegations of her complaint are true, and that the said relatrix had been delivered of a bastard child and that the defendant is the father of said child. It is therefore considered and adjudged that the defendant is the father of the child, of which the relatrix has been delivered.”

At the same term of court, on November 13, 1915, in the same cause, the following entry appears of record:

“Come the parties herein by their respective counsel, and the following further judgment was rendered by the court. It is further adjudged and decreed by the court that the defendant pay to the clerk for the use of Dr. C. O. Bechtol for surgical operation the sum of one hundred seventy-five dollars to be paid within ninety days, and the defendant committed to jail for one year, unless same is paid or replevied at once.”

On December 14, 1915, at the succeeding term of court, the appellant filed with the clerk of the circuit court his appeal bond in the sum of \$350, which was duly approved by the clerk, and on November 16, 1915, he filed his praecipe for a transcript of the entire record in said cause. In the assignment of errors, the cause is entitled Paul Price, by Oliver Price, his next

friend, appellant, against the State of Indiana, on the relation of Florence Gordon, and Charles O. Bechtol, appellees. The error assigned is as follows: "The court erred in adjudging and decreeing that the appellant pay to the clerk, for the use of appellee, Dr. C. O. Bechtol, for surgical operation, one hundred and seventy-five dollars within ninety days, and that he be committed to jail for one year unless the same be paid or replevied at once."

Appellees contend that no question is presented by the assignment, for the reason that the record discloses no exception to the action of the court in rendering the judgment, and no motion to modify the judgment; also that every presumption is in favor of the correctness of the judgment rendered; that the evidence is not in the record, and when the judgment is considered in the light of the presumptions in its favor, it is fully authorized by §1032 Burns 1914, §997 R. S. 1881; that in the absence of an affirmative showing by the record to the contrary, this court must presume that the allowance to Dr. C. O. Bechtol was for some purpose authorized by law, and it may have been for a surgical operation upon the child itself in an effort to save its life, or the money may have been so ordered paid to Dr. C. O. Bechtol because the court may have found the mother to be an improper person to receive the same.

Appellant asserts that the record shows that the judgment is absolutely void; that Dr. C. O. Bechtol was not a party to the suit; that there is no finding which authorizes the judgment in favor of Dr. C. O. Bechtol; that the only judgment authorized in a bastardy proceeding is for the support and maintenance of the child and costs of suit, and the judgment here shows on its face that it is not for the support of the child. Appellant also asserts that he has the right to

obtain relief from a void and unauthorized judgment without saving an exception in the lower court, and without having moved to modify the judgment; also that, inasmuch as the judgment shows on its face that the defendant acknowledged that he was the father of the child, no evidence was necessary, and no presumptions can arise from the absence of the evidence to sustain the judgment which the record plainly shows to be void.

The failure to save properly an exception to the ruling of the trial court, which is assigned as error on appeal, is generally fatal to such assignment, and must be so held in this case, unless it is an

1. exception to the general rule. The same is true of the failure to move to modify the judgment, for the general rule is that a party seeking
2. relief from the form or substance of some part of the judgment rendered against him must first present to the trial court a motion definitely specifying in what respect or particulars the judgment should be modified, and, upon such motion being overruled by the trial court, on appeal the ruling should be assigned as error. *Evans v. State* (1898), 150 Ind. 651, 655, 50 N. E. 820; *Heaton v. Grant Lodge, etc.* (1913), 55 Ind. App. 100, 103, 103 N. E. 488; Elliott, App. Proc. §783 *et seq.*

Appellant, however, concedes the foregoing general rules to be as stated, but asserts that the judgment is void, and that, where such is the case, the injured party on appeal may obtain relief therefrom without first moving to modify the judgment, and without saving an exception to the ruling at the time it was made by the trial court.

This contention requires us to determine whether relief may be so obtained in any case, and if so, then

whether the case at bar falls within the exception asserted by appellant.

Section 1026 Burns 1914, §991 R. S. 1881, relating to bastardy, provides in substance as follows: If the defendant is found to be the father of the child, or "shall confess the same he shall be adjudged the father of such child and stand charged with the maintenance and education thereof." Section 2027 Burns 1914, §992 R. S. 1881, provides that the court shall "make such order as may seem just for securing such maintenance and education to such child, by the annual payment to such mother (or if she be dead or an improper person to receive the same, to such other person as the court may direct) of such sums of money as may be adjudged proper."

These statutes plainly show that the only judgment authorized by them is for the maintenance and education of the child. The mother has no direct

3. interest in the judgment, but is authorized to receive payment in pursuance of the order of the court as the natural guardian of the child and the trustee of the fund, unless she be dead, or an improper person to receive the same, in which event payment shall be made to a person authorized by the order of the court to receive the same. Whether payment be made to the mother, or to another authorized person, the object or purpose of the statute remains one and the same, and the benefits of the judgment are primarily for the child. *Allen v. State, ex rel.* (1835), 4 Blackf. 122, 125; *Heritage v. Hedges* (1880), 72 Ind. 247, 249, and cases cited; *Maker v. State, ex. rel.* (1890), 123 Ind. 378, 382, 24 N. E. 128; *Lewis v. Hershey* (1909), 45 Ind. App. 104, 106, 90 N. E. 332; *State, ex rel. v. Lannoy* (1902), 30 Ind. App. 335, 337, 65 N. E. 1052.

Section 1032, *supra*, provides that: "The death of a bastard shall not be cause of abatement, or bar to any prosecution for bastardy; but the court

4. trying the same shall, on conviction, give judgment for such sum as shall be deemed just."

The judgment in this case cannot be sustained by reason of the foregoing statute, because we are not authorized to indulge the presumption in its favor that the child was dead when the judgment was rendered. *Robinson v. State, ex rel.* (1891), 128 Ind. 397, 27 N. E. 750.

The entry of October 12, 1915, states that the defendant confessed that he was the father of the child and plainly indicates that both the relatrix and the child were alive. On November 13, 1915, the record shows that the court rendered another, or "further judgment," in the same case, without any change or substitution of parties, or any showing that the relatrix had died. The statute plainly indicates that, before the court directs payment to any person other than the mother for the benefit of the child, it must find one or the other of the facts which authorize the designation of such other person. No such facts are found in this case. Though we might infer such finding in and of the judgment in some situations, if it appeared to have been rendered for the benefit of the child as required by the statute, we cannot indulge such inference where the judgment itself indicates that it was rendered for a purpose not authorized by the statute.

Considering the whole record as presented, and the natural presumption that the life of both mother and child continued, there is no basis whatever for presuming that either was dead on November 13, or that the court ordered payment through the clerk to Dr. C. O. Bechtol, for the benefit of the child, because the

mother was not a suitable person to receive payment of the sum adjudicated against appellant. The language of the judgment is not open to such inference. The presumptions that may be indulged in favor of the judgment of a court of general jurisdiction cannot reasonably be carried to the extent of overriding the statute and refuting the plain and reasonable meaning of the judgment as entered. Whether the two entries be considered as one judgment, or as two, for the purposes of this appeal, it sufficiently appears that both mother and child were alive when the entries were made.

The statute primarily authorizes and requires payment to be made to the mother for the maintenance and education of the child. The mother being alive, and there being no finding that she was an improper person to receive such payment, it is not a reasonable presumption to indulge that Dr. Bechtol was substituted in the place of the mother. The language of the judgment, if it does not entirely exclude the possibility of such presumption, at least shows it to be unreasonable.

The judgment requires payment by the defendant to the clerk, and plainly states that it is for the use and benefit of Dr. Bechtol for some surgical operation, but it is not a reasonable inference from the language employed that such payment of the entire amount of the judgment rendered was in conformity with the purposes of the statute aforesaid.

The record, therefore, conclusively shows that the court rendered a judgment on November 13, 1915, in violation of the statute, and that the same is void.

The same result follows whether the last entry

3. be considered as a judgment in favor of Dr. Bechtol, who was not a party to the proceed-

ings, or whether it be considered as a judgment in the case of State, ex rel. Gordon v. Appellant. In the latter view, which is the reasonable interpretation of the entries, it clearly appears that the judgment was rendered for a purpose not authorized by the statute and without warrant of law. The proceeding

5. is of statutory origin and a judgment which is plainly unauthorized by, and contrary to, the statute, is void. *Whitney v. Marshall* (1894), 138 Ind. 472, 478, 37 N. E. 964; *Bartmess v. Holliday* (1901), 27 Ind. App. 544, 556, 61 N. E. 750; *Jones v. Vert* (1889), 121 Ind. 140, 142, 22 N. E. 882, 16 Am. St. 379; *Baldwin v. Humphrey* (1881), 75 Ind. 153, 155; *Wright v. Norris* (1872), 40 Ind. 247, 249; *Strader v. Manville* (1870), 33 Ind. 111, 114.

The judgment being void, appellant may obtain relief from it by direct assignment of error in this court without a motion to modify it having first been presented to the trial court, and without reserv-

6. ing an exception to the action of the court in rendering such void judgment. In §784 of Elliott's Appellate Procedure, the author states that: "An exception must be taken in all cases save those in which the questions are such as may be first made on appeal. We have elsewhere considered the subject of first making questions on appeal. It is only necessary to say here that where there is no cause of action or no jurisdiction, there is no necessity for reserving an exception." See, also, *Davis v. Perry* (1872), 41 Ind. 305, 308.

Before the enactment of the present statute relating to the presentation of questions arising on demurrers to pleadings, it was held that on appeal the question could be first presented by direct assignment of error, even where judgment had been rendered by

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default and there had been no motion to set it aside. *Wright v. Norris, supra; Old v. Mohler* (1890), 122 Ind. 594, 599, 23 N. E. 967.

The court had no jurisdiction to render a judgment payable to the clerk for the benefit of Dr. C. O. Bechtol. As supporting this conclusion, see, also, *Bartmess v. Holliday, supra; Robinson v. Rogers* (1882), 84 Ind. 539, 544; *Board, etc. v. Logansport, etc., Gravel Road Co.* (1882), 88 Ind. 199, 200; *Bristor v. Galvin* (1878), 62 Ind. 352, 358; *Canfield v. State, ex rel.* (1877), 56 Ind. 168, 171.

The judgment dated November 13, 1915, is reversed, with direction to the lower court to vacate the same, and cause the case to be docketed for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 118 N. E. 690.

DIFFENDERFER v. CITY OF JEFFERSONVILLE ET AL.

[No. 9,447. Filed February 26, 1918.]

1. MUNICIPAL CORPORATIONS.—*Defective Sidewalk.—Injuries to Pedestrian.—Contributory Negligence.*—Ordinarily a traveler is not required to forego the use of a street because of a known defect therein, but, if he thereafter attempts to travel the street, he is required to use that degree of care and caution which is commensurate with the knowledge; nor is a traveler necessarily guilty of negligence in attempting to pass over a public street or sidewalk which he knows to be dangerous, even though on account of darkness he cannot see so as to avoid the danger. p. 14.
2. MUNICIPAL CORPORATIONS.—*Defective Sidewalk.—Injuries to Pedestrian.—Action.—Contributory Negligence.—Burden of Proof.*—In an action for injuries resulting from a fall on an icy sidewalk, the burden of proof on the issue of contributory negligence is upon the defendant, which burden is discharged where it appears from the whole evidence that plaintiff is guilty of negligence contributing to his injury. p. 14.

3. **MUNICIPAL CORPORATIONS.—Defective Sidewalk.—Injuries to Pedestrian.—Action.—Contributory Negligence.**—In an action for personal injuries resulting from a fall on an icy sidewalk, where plaintiff, knowing the dangerous condition of the sidewalk, attempted to pass over it, and the danger was such that, under the circumstances, an ordinarily prudent person would not have attempted to use the walk, plaintiff was presumptively guilty of contributory negligence, but such presumption was rebuttable by evidence that he used care commensurate with the danger. p. 14.
4. **MUNICIPAL CORPORATIONS.—Defective Sidewalk.—Injury to Pedestrian.—Contributory Negligence.—Evidence.**—In an action for personal injuries sustained in a fall on an icy sidewalk, where the evidence on the issue of contributory negligence showed that water from a leaky hydrant flowed across a city sidewalk, causing ice to form in freezing weather, so that it was dangerous to use the walk, that there was a grass plot on either side of the walk which was safe for travel, and that plaintiff, knowing such facts, attempted to pass over the sidewalk on a night so dark that he could not see the ice without exercising any care other than looking ahead, and in so doing fell and was injured, such evidence is sufficient to sustain a judgment for defendant. p. 15.
5. **APPEAL.—Review.—Harmless Error.—Instruction.**—In an action for injuries sustained in a fall on an icy sidewalk, where the evidence and the jury's answers to interrogatories affirmatively showed plaintiff's contributory negligence, error, if any, in instructions relating to defendant's duty and its negligence with reference to the removal of obstructions from the sidewalk, and its power to enter upon private property to make repairs, was harmless, and not ground for reversal. p. 15.
6. **MUNICIPAL CORPORATIONS.—Defective Sidewalk.—Injuries to Pedestrian.—Action.—Instructions.**—In an action for injuries sustained in a fall on an icy sidewalk, an instruction that, if plaintiff had knowledge of the presence of ice on the sidewalk, he must be held to have known that there was danger of falling if he attempted to pass over it in the dark, and if he did attempt to so pass over it, and fell and was injured he could not recover, was not erroneous in view of evidence that plaintiff had lived near the scene of the accident more than four years and customarily used the walk in going to and from his work, that he knew there was ice on the walk, rendering it dangerous, and that, though unable to see on account of darkness, he used no care whatever for his safety. p. 16.
7. **MUNICIPAL CORPORATIONS.—Defective Sidewalk.—Injuries to Pedestrian.—Action.—Instructions.—Contributory Negligence.—Intoxication.**—In an action for personal injuries sustained in a

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fall on an icy sidewalk, where there was some evidence that plaintiff was at least partially intoxicated at the time he was injured, instructions informing the jury that intoxication might be taken into consideration as a circumstance in determining whether the person injured was negligent, and whether his negligence contributed to his injury, were not improper. p. 17.

From Clark Circuit Court; *James W. Fortune*, Judge.

Action by George M. Diffenderfer against the City of Jeffersonville and others. From a judgment for defendants, the plaintiff appeals. *Affirmed*.

Edward C. Hughes, Joseph H. Warder, Henry F. Dölger and James L. Bottorff, for appellant.

Jonas G. Howard and H. W. Phipps, for appellees.

IBACH, C. J.—This is an action to recover damages for personal injuries which are alleged to have been occasioned by the negligence of appellees in permitting ice to accumulate and remain for a long time on the sidewalk in front of appellee Sweeney's property in the city of Jeffersonville, the ice being formed from water which had escaped from a hydrant on said Sweeney's premises, and from thence passed out upon the sidewalk. A trial by jury resulted in a verdict and judgment for appellee.

Appellant's motion for a new trial was overruled, and such ruling is assigned as error. The grounds of such motion relied upon relate to the action of the court in giving or refusing to give certain instructions, and to the sufficiency of the evidence to sustain the verdict.

As a consideration of the evidence will materially aid in disposing of the objections to the instructions, we will first dispose of the last question discussed by appellant. On the night of February 7, 1914, between ten and twelve o'clock, appellant was injured by fall-

ing on an icy sidewalk. When injured he was walking on what is known as Front street in the city of Jeffersonville along the sidewalk adjacent to the property of the appellee Sweeney. Appellant had lived in the vicinity of this walk for some years prior to his injury, and was acquainted with it. For three days just prior to February 7, he was confined to his home on account of sickness, and had not passed over this sidewalk during that time. For sometime prior to said date there was a hydrant located on appellee Sweeney's property which had become out of repair and water flowed therefrom over and across the sidewalk. Appellant knew of this condition. He had seen the water flowing over the sidewalk and had noticed ice there during freezing weather. He had observed ice at that particular place during the last days of January and the first days of February, 1914. He passed the place practically every day in going to and from his work. It had rained on February 6 and on that night the weather again turned very cold. About six o'clock on the evening of February 7, appellant left his home and went to the business portion of appellee city. As he approached the defect on his return home he was walking in his usual way, "not a very fast walk." He was looking ahead. "I always look ahead when I am walking at night. I could see the sidewalk."

There is evidence also that appellant visited three saloons while down town, and drank two bottles and one glass of beer. There is evidence also that the sidewalk at this point was not structurally defective, and that the presence of the ice was due to the defective hydrant; that there was a grass plot along either side of the walk at this point which was safe for travel, of which appellant had knowledge, and if

appellant had used it he would have avoided injury. Ice had accumulated on the walk in front of appellee Sweeney's property in the city of Jeffersonville on the night of February 6, 1914, and on other occasions during that winter by reason of the defective hydrant. Appellant slipped and fell on the ice which had so accumulated, and received the injuries complained of. At the time he fell the night was dark, and he was unable to see the ice.

Ordinarily a traveler is not required to forego the use of a street because of a known defect therein, but, if he attempts to travel it, having knowledge of

1. the defect, he is then required to use that degree of care and caution which is commensurate with the known danger. He is not necessarily guilty of negligence in attempting to pass over a public street or sidewalk which he knows to be dangerous, and this is true even though on account of the darkness he cannot see so as to avoid the obstruction. *Town of Mooresville v. Spoon* (1918), (Ind. App.) 118 N. E. 686, and cases cited.

On the issue of contributory negligence the burden of proof was on appellee. Such burden, however, is discharged where it appears from the whole evi-

2. dence that the plaintiff is guilty of negligence contributing to his injury and, in our judgment, in a case like the present where the defect was
3. such that under the circumstances an ordinarily prudent person would not attempt to pass over it, and he did attempt to pass over it and was injured, his knowledge of the danger will presumptively establish contributory negligence. Such presumption, however, is not conclusive and may be rebutted by evidence of the exercise of ordinary care under the circumstances of the particular case. *Town of Monti-*

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cello v. Condo (1910), 47 Ind. App. 490, 94 N. E. 893; *City of Indianapolis v. Cook* (1884), 99 Ind. 10; *Village of Clayton v. Brooks* (1894), 150 Ill. 97, 105, 37 N. E. 574.

If we are correct in such statement of the law, it then becomes material to inquire if there was any evidence tending to rebut this presumption. The

4. evidence, as heretofore indicated, shows that appellant was well acquainted with the walk and its surroundings, knew of the defective hydrant, and that the water therefrom flowed out across the sidewalk at this particular point; that in freezing weather ice would form there, and that there was danger in attempting to pass over it. It further shows that on the night in question when it was so dark he could not locate the ice he walked down the sidewalk in his usual walk without exercising any care other than looking ahead, which, in view of the extreme darkness, was unavailing. Taking the evidence as a whole, we are unable to find any tending to show that appellant exercised any care of a prudent person under the circumstances, and therefore the evidence is sufficient to sustain the judgment.

Our conclusion is further supported by the answers to interrogatories in which the jury have found the facts to be substantially as we have indicated were shown by the evidence. In short, the answers are in harmony with the general verdict, and show without contradiction that appellant was guilty of contributory negligence in passing over the sidewalk in question.

Although appellant has devoted much of his brief to a discussion of instructions given or refused by the court, we do not believe it necessary for us to

5. consider them all in detail. We have said the evidence and answers to interrogatories affirm-

actively show that appellant was guilty of contributory negligence, so that, if it is conceded that some of the instructions given relating to negligence on the part of appellee and the duties devolving upon it with reference to the removal of obstructions upon its sidewalks and its power to enter upon private property to make repairs were incorrect, they were harmless, and do not constitute ground for reversal, as the answers to the interrogatories could not be said to have been influenced thereby upon the question of contributory negligence. *Baltimore, etc., R. Co. v. Morris* (1913), 54 Ind. App. 479, 103 N. E. 35; *Abelman v. Haehnel* (1914), 57 Ind. App. 15, 103 N. E. 869; *Grand Rapids, etc., R. Co. v. Oliver* (1913), 181 Ind. 145, 100 N. E. 1066; *Nelson v. Chicago, etc., R. Co.* (1913), 55 Ind. App. 373, 103 N. E. 857; *Miller v. Coulter* (1914), 57 Ind. App. 295, 107 N. E. 14.

Appellant complains of instruction No. 7 given at the request of appellee. The jury were told by this instruction that if appellant had knowledge of

6. the presence of ice upon the sidewalk, and that the same was slippery, he must be held to have known that there was danger of falling if he attempted to pass over it in the dark, and if he did so attempt to pass over it with knowledge of the presence of the ice, and in so doing fell thereon and was injured, he cannot recover.

The court is unable to determine the precise objection which appellant seeks to make to this instruction, but even if, under some facts, the instruction could be said to be erroneous, it was not erroneous under the facts of this case. The answers to interrogatories, uninfluenced by the instructions complained of, show that appellant had lived within a block of the obstruction complained of for more than four years, and it

was his custom to use such way in going to and from his work, and he had so used the way for the greater part of the six months just preceding the accident; that he knew that there was ice on the sidewalk on the occasion he attempted to pass it immediately before he fell; that he appreciated and knew that ice rendered the sidewalk dangerous to walk upon; that he could have safely passed the ice by walking on the grass plot on either side of the same; that he was unable to see the ice on account of the darkness, and that he made no effort to discover it. The undisputed evidence further shows that appellant used no care whatever for his own safety.

What we have said concerning instruction No. 7 will apply to other instructions discussed relating to the same proposition.

Certain other instructions are assailed upon the ground that they assume that appellant was intoxicated at the time he received his injury, while

7. there is no evidence to show such fact, and it is further contended that such instructions are also erroneous in that they told the jury that intoxication when shown amounted to contributory negligence, which is not the law. There was some evidence from which the jury might have inferred some degree of intoxication, and appellant concedes the rule to be that intoxication when proved may be taken into consideration by the jury as a circumstance in determining whether the person injured was himself negligent at that time, and whether such negligence contributed to his injury. This we believe is as far as the instructions complained of went.

It is unnecessary for us to consider other instructions given at the request of appellee or those refused

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which were tendered by appellant, for they are all controlled by the legal principles which we have heretofore announced.

No reversible error is presented by the record.

Judgment affirmed.

NOTE.—Reported in 118 N. E. 836. Municipal corporations: contributory negligence as affecting liability for defects and obstructions in streets, 21 L. R. A. (N. S.) 614, 48 L. R. A. (N. S.) 628; icy sidewalk as defect, liability, 7 Am. Rep. 206; traveller's knowledge of defect, duty as to taking different route, 6 Ann. Cas. 32; contributory negligence as affected by intoxication, 19 Ann. Cas. 1176, Ann. Cas. 1914D 114, 47 L. R. A. (N. S.) 737, L. R. A. 1916F 102, 28 Cyc 1422. See under (1) 28 Cyc 1419.

PEOPLES OUTFITTING COMPANY v. WHEELING MATTRESS COMPANY.

[No. 9,487. Filed February 26, 1918.]

1. FRAUDS, STATUTE OF.—*Construction*.—In determining whether a transaction is within the statute of frauds the courts will hold strictly to establish rules. p. 22.
2. FRAUDS, STATUTE OF.—*Sale of Goods*.—*Identity of Property*.—*Parol Evidence*.—*Letters*.—A letter, "Ship us the \$66.00 size, as per instructions to your" president, the order referring to comforters, was not sufficient to take the transaction out of statute of frauds, where the issue was as to the quality of goods, a matter which could not, in the absence of pertinent writings or a trade catalogue, be determined without resorting to oral evidence. p. 22.

From Marion Circuit Court (22,584); *Louis B. Ewbank*, Judge.

Action by Wheeling Mattress Company against the Peoples Outfitting Company.

From a judgment for plaintiff, the defendant appeals. *Reversed*.

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Joseph B. Kealing and Martin M. Hugg, for appellant.

Roemler & Chamberlain, for appellee.

DAUSMAN, J.—Appellee instituted this action against appellant before a justice of the peace. It is averred in the complaint that appellant is indebted to appellee in the sum of \$66 for goods, wares and merchandise sold and delivered. The following is the bill of particulars filed with the complaint: “1 doz. No. 529 Down Comforts, \$66.00.” No answer was filed. §1749 Burns 1914, §1358 R. S. 1881. The justice of the peace rendered judgment for appellee, from which an appeal was taken to the circuit court. Trial by the court resulted in a finding and judgment for appellee in the sum of \$66, interest and costs.

The evidence shows the following facts: Mr. Leo Wolf is president of the Wheeling Mattress Company. In April, 1912, he called at appellant’s store in Indianapolis and procured an order for goods. The order consisted of eight distinct items and the total price of the goods, as stated in the order, is \$183.93. He transacted the business with Edward A. Kahn, treasurer of appellant company. Wolf made out the order in duplicate, and gave the carbon copy thereof to Kahn. The order was not signed by the buyer. The last item of the order is in the following words and figures: “1 Doz. No. 251 Comforts Down, 54.00.” The goods were to be shipped September 1, 1912. Subsequently the following letters were written by appellant to appellee and duly received by the latter:

“Oct. 23, 1912. ”

“Mr. Leo Wolf,

“Care Wheeling Mattress Co.,

“Wheeling, W. Va.

“Dear Sir:—Invoice dated September 17

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received today, and in sampling I noticed sizes do not run according to measurements sold. However, I presume this is the case with all comforts; but the point I want to bring to your notice is that you sold for our personal needs a bale No. 251 size 60 x 78 which is now enroute, and, judging from dimensions of goods received, this comfort would be hardly large enough for a single bed. If you remember correctly, I wanted to have a large size at the time and you thought this would suffice. I am writing you now to learn if I could not return this bale to you or your factory and instruct them to ship a size at least 72 x 84, and I believe the cost of these would be about \$4.00 more than the price of your No. 251. Assuring you this matter to receive your immediate attention by placing order as desired will be greatly appreciated by me and we will return the one bale upon its receipt. Trusting to hear from you by return mail, we are,

“Respectfully yours,

“Peoples Outfitting Co.,

“E. A. K.”

“Wheeling Mattress Co.,
Wheeling, W. Va.

“Oct. 31, 1912.

“Gentlemen:—Goods under invoice Oct 14th received. We are short one dozen No. 251, which evidently were not shipped as expense bill calls for seven bales, which we received. We will deduct from your invoice \$54.00, and please instruct your mill to cancel this number and ship us the \$66.00 size, as per instructions to your Mr. Wolf. This is of great importance to us.

“Respectfully yours,

“Peoples Outfitting Co.

“E. A. K.”

“Wheeling Mattress Co.,
“Wheeling, W. Va.

“Nov. 29, 1912.

“Gentlemen:—Goods under invoice Nov. 11th received Tuesday and unpacked today. We

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returned them today. We regret these also are not as sold. We purchased from you silk comforts and you shipped us sateen, which will not serve the purpose. Credit our account with same and send us freight amounting to \$1.56.

“Respectfully yours,
“Peoples Outfitting Co.
“E. A. K.”

These letters were not answered by appellee. The goods designated by the last item of the first order were never shipped to appellant. Acting on appellant's letter of October 31, appellee shipped to appellant some sateen comforts, which are the goods represented by the bill of particulars filed with the complaint. These goods were returned to appellee, whereupon they were put in storage. The comforts were made by a concern known as Palmer Bros. Company. Appellee issued no catalogue. The number on the memorandum of the first order and the number on the bill of particulars are the private numbers used by appellee in its dealings with the manufacturing company. Appellant knew nothing about the meaning of these numbers.

The only conflict in the evidence is with respect to the quality or identity of the goods alleged to have been sold and delivered. Mr. Kahn testified: “I asked him if he could furnish silk down comforts. He said he could. I told him the members of the firm wanted them for their personal use. He said that No. 251 covered that. I then ordered a dozen. I did not order sateen.” Mr. Wolf testified: “Nothing was said about silk.”

Is the transaction within the statute of frauds? §7469 Burns 1914, §4910 R. S. 1881.

When considered with reference to its origin and the evils it is intended to remedy, the beneficence of

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the statute of frauds becomes apparent. It

1. tends to promote carefulness and exactness in commercial transactions. It removes the temptation to perjury. In the administration of justice it prevents the rights of litigants from resting wholly on the precarious foundation of memory. Like the statute of limitations, it operates in a sense as a statute of repose by avoiding strife and litigation. For these reasons the courts will hold strictly to the established rules. *Ridgway v. Ingram* (1875), 50 Ind. 145, 19 Am. Rep. 706; *Lee v. Hills* (1879), 66 Ind. 474; *Sprankle v. Trulove* (1899), 22 Ind. App. 577, 54 N. E. 461; *Hausman v. Nye* (1878), 62 Ind. 485, 30 Am. Rep. 199; *Porter v. Patterson* (1908), 42 Ind. App. 404, 85 N. E. 797; *Breckenridge v. Crocker* (1889), 78 Cal. 529, 21 Pac. 179; *Oakman v. Rogers* (1876), 120 Mass. 214.

The first order cannot be considered for any purpose. It is not signed by appellant. The letters do not refer to it in such manner as that it

2. may be construed as a part of them or of any one of them. It is not filed with the complaint as a bill of particulars. The merchandise designated by the bill of particulars constitutes no part of that order. The first seven items of that order were shipped to, and received and accepted by, appellant, and presumably payment therefor was promptly made. Then by the mutual assent of the parties, as evidenced by their conduct, the last item was canceled. That cleared the ground for a new transaction. Afterward appellee shipped different goods under a different number and for a different price. In making this shipment appellee must have relied upon appellant's letter of October 31. We assume that this is the basis of appellee's

contention, for we have discovered no other foundation on which it can rest. The words of the letter, which constitute the order, are: "Please instruct your mill to * * * ship us the \$66.00 size, as per instructions to your Mr. Wolf."

What were appellant's instructions to Mr. Wolf? Does the order refer to oral or written instructions? The letters contain no reference to each other, or to any catalogue, or to any record. One of the important elements, as in every sale of goods, is the identity of the subject-matter. In the case at bar that is the very thing in dispute, and must be determined, if at all, from the testimony of two witnesses who have nothing on which to rely but memory. The goods involved in the alleged sale are of such a character that the quality becomes a determining factor in identifying the subject-matter. Did appellant order goods made of muslin, denim, wool, sateen or silk? If, as appellee claims, nothing was said on this subject, why ship sateen? How can the essential elements of the alleged bargain be determined by a court? Manifestly there is no way other than by resorting to parol evidence, and that is the very thing prohibited. The writings signed by appellant are too vague and uncertain to enable us to discover from them alone what the terms of the contract are. Without violating the rules, we cannot ascertain the contract which the courts are asked to enforce. Indeed, we are in doubt whether there was a contract at all, since from the legitimate evidence it does not appear that the minds of the parties met and agreed to the same thing in the same sense. We are of the opinion that the case is within the statute, and that the finding is contrary to law. 20 Cyc 258; 1 Mechem, Sales §§426, 433, 443.

Appellee has not deemed it worth while to file a

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brief, and the observations of the Supreme Court on such indifference are applicable here. *Walls v. State, ex rel.* (1895), 140 Ind. 16, 23, 38 N. E. 177; Ewbank's Manual §190.

The judgment is reversed, and the trial court is directed to sustain the motion for a new trial.

NOTE.—Reported in 118 N. E. 827. See under (2) 20 Cyc 270, 9 Am. Dec. 188.

W. T. RAWLEIGH MEDICAL COMPANY v. VAN WINKLE
ET AL.

[No. 9,477. Filed February 28, 1918.]

1. SALES.—*Sale of Goods.—Contract.—Construction.*—Where a seller of drugs and medicines was obligated by the contract of sale to instruct and advise the buyer, who purchased for resale, as to the best methods of selling the goods, and in pursuance to such agreement mailed to the buyer booklets and letters suggesting that he leave samples with prospective purchasers, to be finally purchased and paid for only in event that they proved satisfactory, the buyer could not escape liability for samples so delivered and not paid for, in the absence of anything in either the booklets or the letters, or in the contract, indicating that the buyer should be excused from payment for such articles. p. 27.
2. SALES.—*Sale of Goods.—Right to Return.*—Where defendant, who purchased drugs and medicines from plaintiff under a contract not authorizing their return, sent back a quantity of unsold goods at the direction of one representing himself to be plaintiff's traveling auditor, but did not list them on certain inventory blanks as required by plaintiff's custom in such cases, and plaintiff informed defendant that it refused to receive the goods back for that reason and that it would not do so unless they were properly inventoried on blanks furnished for that purpose and the freight paid, defendant, having failed to comply with the conditions imposed by plaintiff, cannot avoid liability for the articles so returned on plaintiff's refusal to accept the same. pp. 29, 31.
3. PRINCIPAL AND AGENT.—*Authority of Agent.—Proof.—Declara-*

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tions.—The authority of an agent cannot be proved by his declarations alone. p. 30.

4. *SALES.—Contract.—Construction*.—A provision of a contract for the sale of goods, payment of which was secured by written guaranty, that the seller did not obligate itself to honor the buyer's orders for goods, if his account was at any time in an unsatisfactory condition, was for the benefit of the seller, and not the buyer or his guarantors. p. 31.

From Johnson Circuit Court; *William E. Deupree*, Judge.

Action by the W. T. Rawleigh Medical Company against Robert Van Winkle and others. From a judgment for defendants, the plaintiff appeals. *Reversed*.

Hall & Pell, for appellant.

Miller & White, for appellees.

CALDWELL, J.—Appellant, a corporation of Freeport, Illinois, brought this action against appellee Robert VanWinkle, and his coappellees, William F. McCord, Jonathan Allen and Frank VanWinkle, to recover for goods sold and delivered to appellee Robert VanWinkle under a certain written contract executed by him and appellant on November 20, 1908, the performance of which by Robert VanWinkle was guaranteed by his coappellees in writing indorsed on the contract. A trial resulted in a verdict and judgment in favor of appellees.

The sole error assigned is the overruling of the motion for a new trial, under which assignment the sufficiency of the evidence is challenged. To determine the sufficiency of the evidence requires an outline of the issues. The contract and guaranty are exhibited with the complaint. The former is in substance as follows: That Robert desired to purchase of appellant at wholesale prices, on credit, to sell to consumers at retail prices fixed by appellant, medi-

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cines, stock foods, etc. Robert agreed to pay for the goods by remitting to appellant weekly one-half of his receipts, and to make payment in full within a reasonable time after the termination of the contract for any cause. Appellant agreed to fill all reasonable orders made by Robert for goods, and to deliver such goods on board cars at Freeport, Illinois, provided his account was in satisfactory condition, and to furnish to him free of charge a reasonable amount of advertising matter, report and order blanks, and to give him free of charge, after he began work, instructions and advice through letters, bulletins and booklets, as to the best methods of selling the goods to consumers. The contract specified that it was to be in force only so long as Robert's account and the amount of his purchases were satisfactory to appellant, and that Robert or his guarantors might be released from the contract at any time by paying in cash the balance due appellant on the account. A bill of particulars filed with the complaint discloses an account stated under date of December 30, 1911, amounting to \$1,488.92, and goods thereafter purchased from time to time up to March 12, 1913, aggregating \$887.73, or a total of \$2,376.65, with credits of weekly payments between January 1, 1912, and October 9, 1913, aggregating \$1,476.95, leaving a net balance due appellant of \$899.70.

Appellee Robert Van Winkle answered in four paragraphs: First, general denial. Second, in substance that the account sued on was composed of two items: First, of goods received from appellant with directions to deliver them to prospective customers as samples, and not to be paid for if they proved to be worthless; that they did prove to be worthless and were not paid for; second, goods amounting to \$131.32

which were returned to appellant by its direction, and which were received and accepted by appellant. The third paragraph was to the effect that the goods sued for were worthless; the fourth paragraph, payment.

The other appellees answered in five paragraphs: First, general denial; second, practically the same as Robert's third; third and fifth, that the goods sued for were delivered to Robert under a new contract made without the knowledge or consent of such appellees, by the terms of which Robert was required to and did deliver such goods to prospective customers as free samples, and not to be paid for, and that such customers did not pay for them; fourth, that in violation of the written contract between appellant and Robert, the former sold to the latter the goods sued for when his account was not in a satisfactory condition.

Appellant introduced evidence making a *prima facie* case, to the effect that it sold and delivered goods to Robert from time to time after the execution

1. of the written contract, and under its terms, and that Robert made weekly payments thereunder, and that on January 1, 1912, the balance due on Robert's account after deducting all weekly payments was \$1,488.92. Under date of January 2, 1912, Robert acknowledged in writing over his signature that such balance was correct. That thereafter from time to time the appellant sold and delivered to Robert goods amounting to \$887.73, the last sale having been made on March 12, 1913; that the contract between the parties was terminated September 27, 1913, and that after January 4, 1912, Robert made weekly payments on his account amounting to \$1,476.95, the last payment having been made October 9, 1913, and the balance due being \$899.70.

There was no evidence that any part of the sum sued for had been paid. There was some evidence that of the goods sued for about \$16 worth at the retail price, or \$8 worth at the wholesale price, was of no value. There was no other evidence in support of the answer of no consideration. The evidence offered in support of Robert's second paragraph of answer, and the third and fifth paragraphs filed by the other appellees was to the following effect: As a preliminary, it will be remembered that the written contract obligated appellant to instruct and advise Robert free of charge, by means of letters, bulletins and booklets, as to the best methods of selling to consumers the products which he purchased of appellant. After Robert commenced business, appellant at various times between August, 1909, and September, 1911, mailed to him circular letters on the general subject of urging him to speed up his sales, and suggesting as a wise plan that experience had proved to be most effective that he leave samples of certain medicines and other products with prospective purchasers to be tried, and to be finally purchased and paid for only in case such medicines and other products proved to be satisfactory. Booklets were introduced in evidence also containing advice and suggestions of the same general nature. These letters and booklets were mailed to Robert by appellant in discharge of its agreement to do so, as contained in the written contract. They are plain and unambiguous in their terms, and it is within the province of this court to construe them. We find nothing in them that tends to prove that goods which Robert was advised to deliver to prospective customers as samples, and as above indicated, were not intended to be paid for by them. Neither do we find in such advice

and suggestions any element of a new contract between appellant and Robert. On the contrary, such advice and suggestions were given and made pursuant to an obligation of the written contract to that effect.

The evidence disclosed that Robert shipped back to appellant goods of the value of \$131.32. The facts were as follows: There was nothing in the

2. original contract that authorized Robert to return to appellant any goods purchased and received by him under the contract, and nothing obligating appellant to receive any such goods if so returned. Robert testified that a Mr. Salsman called on him in June, 1913, and represented that he was a traveling auditor of appellant, and directed him to reship to appellant certain unsold goods; that some of such goods had been returned to Robert by purchasers as unsatisfactory, but what portion thereof had been so returned Robert was unable to say; that he kept such goods until in February, 1914, and then crated them carefully and shipped them to appellant. Appellant refused to receive them. There was evidence that it was appellant's custom in dealing with its customers to receive back, and credit such customers with the value of any unsold goods so returned, on certain conditions which were set out in certain inventory blanks, among such conditions being that such customers were required to prepay the freight and certain charges of unpacking, checking up, etc., and that the goods must be in good condition, and that the goods so returned must be listed on such inventory blanks, and a copy of the list mailed to appellant. There was no evidence that Robert had any knowledge of such custom unless he received it from such inventory blanks, copies of which appellant claimed to have mailed to him both before and

after he shipped such goods back to appellant, but which Robert denied that he had received. Robert in returning the goods listed them on a different sort of blank not containing such conditions, one copy of which he mailed to appellant. Under date of February 18, 1914, appellant mailed a letter to Robert acknowledging the receipt of a bill of lading for goods so returned, and notifying him that if he desired appellant to accept such goods they must be properly listed on inventory blanks, copies of which the letter stated were inclosed, and that he must prepay the freight, etc., and that if he desired the goods to be accepted, he must act promptly. By letter dated March 11, 1914, appellant acknowledged the receipt of a list of the goods made out on an order blank rather than an inventory blank, and in addition repeated substantially the statements contained in the letter of February 18. These letters informed Robert that the goods were in the possession of the railroad company, and had not been received or accepted by appellant, and that appellant would not accept or receive them unless Robert complied with the conditions on which appellant under its custom of doing business accepted returned goods. Robert received such letters in due course, but ignored them. As we have said, the written contract did not authorize Robert to return goods, and did not obligate appellant to accept them if returned. The evidence was not sufficient to justify him in returning the goods pursuant to the direction of Mr. Salsman. There was no proper evidence to show that Mr. Salsman was the agent or representative of appellant. It is true that there was evi-

3. dence that he stated to Robert that he was a traveling auditor of appellant, but agency can-

not be proved by the declarations of the agent alone. *Johnston Harvester Co. v. Bartley* (1882), 81 Ind. 406. There was no evidence that appellant learned that Salsman had directed the goods to be returned, and no evidence that it ratified any such direction by accepting them or otherwise. Appellant planted itself on its custom that governed in the return of goods, and Robert, although afforded abundant opportunity to do so, failed and refused to comply with such custom. The evidence, therefore, was not sufficient to entitle Robert to credit for the value of the goods which he attempted to return.

Respecting the fourth paragraph of answer filed by the appellee other than Robert, such paragraph was predicated, as we have said, on a certain pro-

4. vision of the written contract to the effect that appellant did not obligate itself to honor Robert's orders for goods, if his account at any particular time was in an unsatisfactory condition. While we believe that this provision of the contract was inserted for the benefit of appellant rather than appellee, it may be said further that a careful investigation of the evidence as set out in the briefs fails to disclose that any goods were sold or delivered to Robert after appellant had made any statement that his account was in an unsatisfactory condition, if such a statement was made.

There was other evidence which in a general way bears upon the question of the sufficiency of the evidence to sustain the verdict. Thus, as we have said, appellant made its last shipment of goods to Robert on March 12, 1913. Under the respective dates of September 28 and October 25, 1912, and April 28 and May 15, 1913, he wrote letters to appellant on the general subject of his desire to continue in the busi-

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ness, and declaring his purpose to pay and discharge his account as rapidly as possible, in none of which did he express any dissatisfaction with reference to the state of his account. He wrote to the same effect under date of September 30, 1913, after appellant had terminated his contract, expressing his desire to continue in the business, and requesting that he might be permitted to do so by sending cash with each order. Without expressing any opinion as to the amount of Robert's unpaid account as disclosed by the evidence, we conclude that the evidence was insufficient to sustain the verdict. Other questions presented are not considered or decided, as they are not likely to arise on a retrial.

Judgment is reversed, with instructions to sustain appellant's motion for a new trial.

NOTE.—Reported in 118 N. E. 834. See under (2) 35 Cyc 254.

LESLIE v. EBNER, ADMINISTRATOR.

[No. 10,014. Motion to dismiss overruled October 25, 1917. Opinion filed March 1, 1918.]

1. EXECUTORS AND ADMINISTRATORS.—*Claims Against Estate.—Practice.—Motion for New Trial.—Statute.*—Under §2843 Burns 1914, Acts 1883 p. 156, providing that the trial of claims filed against decedents' estates shall be conducted as in ordinary civil cases, the rules of procedure in civil causes should be followed where applicable, so that motions for new trial are contemplated as in civil causes. p. 36.
2. APPEAL.—*Bond.—Time for Filing.—Statute.*—Under §2978 Burns 1914, Acts 1913 p. 65, relating to appeals and providing that an appeal bond must be filed within thirty days after the decision complained of, the time begins to run from the rendering of final judgment. p. 36.

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3. **EXECUTORS AND ADMINISTRATORS.—*Claims Against Estate.—Time for Taking Appeal.***—In civil causes, which include trials of claims against decedents' estates, the thirty days after decision for filing an appeal bond, as provided by §2978 Burns 1914, Acts 1913 p. 65, begins to run from the time of overruling the motion for new trial when filed after the rendering of judgment. p. 36.
4. **APPEAL.—*Filing Transcript.—Time.***—Under §2978 Burns 1914, Acts 1913 p. 65, relating to appeals from decisions growing out of matters connected with decedents' estates and providing that the appeal bond shall be filed within thirty days after judgment and the transcript within ninety days after filing the appeal bond, where one whose interests are adverse to the estate prosecutes an appeal, he is entitled to 120 days from the rendering of final judgment within which to file his transcript in the appellate tribunal, although the appeal bond may have been filed within less than the thirty days; and an administrator, even though not required to furnish an appeal bond, has the same period of time in which to file the transcript on appeal. p. 37.
5. **APPEAL.—*Briefs.—Defects.—Necessity of Objections.—Statute.***—Under §3 of the act of 1917, Acts 1917 p. 523, requiring appellee, within fifteen days after the time for filing appellant's brief has expired, to file objections to the record and briefs, pointing out wherein the rules of court have not been complied with, and providing that failure to do so is a waiver of defects, where appellee did not file objections, the court is authorized to examine the record, including the evidence, to determine the merits of the appeal, though appellant has not complied with the rules of court in that his statement of the evidence consists largely of conclusions with nothing to indicate the source of such evidence, and his points and authorities consist largely of abstract propositions of law. p. 40.
6. **CORPORATIONS.—*Stock Subscription.—Collateral Agreements.—Effect.***—An agreement made by one selling shares of corporate stock that, if the notes given for the stock were paid by the maker, the amount thereof shall be repaid out of the first dividends declared and that dividends declared on the stock of the company's financial agent might be appropriated for that purpose, did not amount to an agreement that the notes should be treated as a mere loan of the maker's credit, and that they should be required to be paid only from dividends. p. 40.
7. **BILLS AND NOTES.—*Promissory Notes.—Actions.—Defenses.—Fraud.—Burden of Proof.***—In an action on a promissory note, where defendant alleged that the execution of the note was procured by fraud, he had the burden of proof on that issue. p. 41.

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8. **CORPORATIONS.—Stock Subscriptions.—Fraud.—Evidence.—Sufficiency.**—In an action on promissory notes given in payment of a stock subscription in a mining company where defendant alleged that the execution of the notes was procured by fraudulent representations by the corporation's financial agent that the company owned valuable mining properties in Mexico, evidence showing that at the time the notes were executed the company had acquired valuable mining properties in Mexico and that it thereafter extended its holdings until it owned five mines, that it had, under the supervision of its engineers, constructed substantial buildings, installed machinery, had done considerable work at a large expense in developing the mines, and partially completed a wagon road to a railroad connection twenty miles away, that the mines had actually produced a large amount of ore bearing gold, silver, iron and copper in paying quantities, and that, until the company was forced to suspend operations because of a civil war in Mexico, its property was of the value of several million dollars, is insufficient to show that the representations alleged were false and fraudulent. p. 41.

9. **EVIDENCE.—Admissibility.—Documentary Evidence.—Identification.**—It is improper to admit in evidence written communications in the form of exhibits where they are not sufficiently identified. p. 44.

From Daviess Circuit Court; *James W. Ogdon*, Judge.

Action by Frank W. Leslie on a claim against Lawrence A. Ebner, administrator of the estate of Joseph L. Ebner, deceased. From a judgment for defendant, the plaintiff appeals. *Reversed*.

Milton S. Hastings, Josiah G. Allen, Arthur W. Allen, William H. Dailey and Clem V. Hoke, for appellant.

L. E. Ritchey, for appellee.

CALDWELL, J.—Appellant has appealed from a judgment rendered against him on a claim filed against the estate of appellee's decedent. Appellee moves to dismiss the appeal. The facts are as follows: Judgment was rendered on December 23, 1916. Appel-

lant's motion for a new trial was overruled on February 24, 1917, and thereafter on that day he filed his appeal bond. The transcript was filed in this court on June 18, 1917. This court did not extend the time within which to file the appeal bond. It appears then that the appeal bond was not filed within thirty days after the judgment was originally rendered. It appears also that the transcript was not filed within ninety days after the filing of the bond, or within 120 days after the judgment was originally rendered, but that it was filed within 120 days after the overruling of the motion for a new trial. The parties agree that §2978 Burns 1914, Acts 1913 p. 65, governs respecting both the time within which and the manner of perfecting the appeal. Literally that section is to the effect that the appeal bond must be filed within thirty days after the decision complained of, in the absence of an extension of time granted by the appellate tribunal, and that the transcript must be filed within ninety days after the filing of the bond. Appellee contends that December 23, 1916, the day on which the judgment was originally rendered, marks the beginning of the time limited for the filing of the bond, and that consequently it was not filed within the thirty-day period. Appellant, however, insists that the overruling of the motion for a new trial, where that event is subsequent to the original rendering of judgment, is the beginning of the period so limited, and consequently that the bond was filed in time. It is appellee's second contention that in any event the filing of the bond is the beginning point of the time within which the transcript must be filed, and that it must be filed within ninety days thereafter, while appellant argues that under the statute the rendering of the final judgment, in this case the overruling of the motion for a

new trial, sets to run the time within which both the bond and the transcript must be filed, and that the former must be filed within thirty days and the latter within thirty days plus ninety days, or 120 days thereafter. It will be observed that here the bond was filed on the day on which the motion for a new trial was overruled, and the transcript was filed 114 days thereafter. We proceed to consider the various arguments advanced by the parties to support their respective contentions:

Section 2843 Burns 1914, Acts 1883 p. 56, provides in substance that the trial of claims filed against decedent's estates shall be conducted as in

1. ordinary civil cases. It follows that where the statute does not specify the practice in the trial of such claims, the rules of procedure in civil causes should be followed where applicable. *Goodbub v. Estate of Hornung* (1891), 127 Ind. 181, 26 N. E. 770. It results that in trials of claims filed against decedent's estates, motions for a new trial are contemplated as in civil causes. *Boots v. Griffith* (1883), 89 Ind. 246; *McConahey's Estate v. Foster* (1898), 21 Ind. App. 416, 52 N. E. 619; *Lester v. Lester, Exr.* 1880), 70 Ind. 201; Henry, Probate Law §§274, 284.

While, literally, §2978, *supra*, is to the effect that the appeal bond must be filed within thirty days after the "decision" complained of, the rendering of

2. the final judgment in fact marks the beginning of such time. *Galentine v. Brubaker* (1896), 147 Ind. 458, 46 N. E. 903.

In civil causes where the filing of a motion for a new trial is subsequent to the rendering of the

3. judgment, the time specified by statute for taking an appeal begins to run from the time

of overruling the motion. *Blaemire v. Barnes* (1909), 173 Ind. 657, 91 N. E. 232.

It follows that February 24, 1917, rather than December 23, 1916, is the date from which must be counted the time granted by §2978, *supra*,

4. within which to file the appeal bond. The bond was filed on that day, and consequently within time. The transcript was filed 114 days thereafter, and consequently within 120 days after the overruling of the motion for a new trial, but not within ninety days after the filing of the appeal bond. Where the party whose interests are adverse to the estate prosecutes an appeal under §2978, *supra*, the courts hold, apparently in conflict with the literal reading of the section, that he is entitled to 120 days from the rendering of the final judgment within which to file his transcript in the appellate tribunal, although the appeal bond may have been filed within less than the thirty days specified. *Thomas v. Davis, Admr.* (1916), 64 Ind. App. 378, 115 N. E. 961; *Simons v. Simons* (1891), 129 Ind. 248, 28 N. E. 702. See, also, *Lindley v. Darnall, Admr.* (1899), 24 Ind. App. 399, 56 N. E. 861; *Vail v. Page* (1910), 175 Ind. 126, 93 N. E. 705.

The holding is the same where an administrator of an estate appeals, he not being required to file an appeal bond. *Willis v. Ferguson* (1916), 62 Ind. App. 563, 111 N. E. 810. See, also, *Crittenberger v. State, etc., Trust Co.* (1916), 63 Ind. App. 151, 114 N. E. 225.

Motion to dismiss is overruled.

OPINION ON MERITS.

CALDWELL, J.—Appellant filed in the clerk's office of the Knox Circuit Court a claim in five paragraphs

against the estate of Joseph L. Ebner, deceased, appellee's decedent. Each paragraph of the claim was based on a promissory note purporting to have been executed by decedent to Charles P. Reiniger, and indorsed by the latter and also by the Reiniger Mining and Smelting Company by its treasurer, Joseph H. Brant. The first of these notes was dated December 23, 1913, the next three, March 2, 1914, and the remaining one June 20, 1914. By their terms they matured as follows, respectively: January 1, March 2 and September 2, 1915, April 10, 1916, and August 1, 1915. They were given for the following respective amounts: \$500, \$750, \$750, \$1,000 and \$1,000. The form of each of the notes was such as to constitute it a negotiable instrument under the Uniform Negotiable Instruments Act (Acts 1913 p. 120, §9089a *et seq.* Burns 1914). Each paragraph of the claim alleged in substance that, before the maturity of the note upon which such paragraph was predicated, Reiniger indorsed it for value to the Reiniger Mining and Smelting Company, and that the latter before its maturity indorsed it for value to appellant. The claims having been disallowed were transferred for trial, and by regular proceedings were thereafter venued from the Knox Circuit Court to the Daviess Circuit Court. In the latter court appellee filed an amended answer in four paragraphs, and to the following effect: First, general denial; second, that the Peoples Savings Bank, of Van Wert, Ohio, rather than appellant, was the real party in interest; third, no consideration, and that appellant took the notes with notice; fourth, that Reiniger procured the execution of the notes by false and fraudulent representations, and that appellant took with notice. The reply

was a general denial. A trial resulted in a finding and judgment in favor of appellee.

Appellant questions the sufficiency of the evidence. It therefore becomes necessary to outline more fully the fourth paragraph of answer. Although not directly alleged, it is a fair inference from this paragraph that the notes were given in consideration of certain shares of the capital stock of the Reiniger Mining and Smelting Company issued to decedent. The fraudulent representations by virtue of which it is alleged that the execution of the notes in suit was procured were to the following effect: That said company was the owner of certain rich and valuable mines in the State of Sonora, Mexico, and that in and about such mines there was mineral ore ready for the market of the value of \$2,000,000; that the capital stock of the company was principally owned by Reiniger himself, and would yield enormous dividends to the stockholders in the near future. It is alleged that such representations were false and fraudulent, and that by reason of them decedent was induced to execute the notes in suit, and that neither such mining property nor the capital stock of the company was, or had been at any time of any value. It is alleged also that as a further inducement to the execution of such notes Reiniger agreed with decedent that the dividends arising from the operation of the mines should meet and pay the notes as they severally matured, and that the execution of such notes should be treated as a loan of the credit of decedent in the promotion of the mining enterprise, and to the end that dividends arising therefrom could and would pay said notes. As we have said, it is alleged also that appellant took the notes with knowledge of the facts.

Appellee insists that appellant has not complied

with the rules of this court, in that his statement of the evidence consists largely of conclusions,

5. with nothing to indicate the source of such evidence; and also in that his points and authorities consist largely of abstract propositions of law, and that therefore nothing is presented for our consideration. Appellee in the main is correct in his contention. However, this appeal is governed by the act of 1917 (Acts 1917 p. 523). Under §3 of that act it is made the duty of an appellee, within fifteen days after the time for filing the appellant's brief has expired, to file in the office of the clerk of this court his objections to the record and briefs, pointing out wherein he believes the rules of this court have not been complied with; and his failure so to do is a waiver of any defects in the record or briefs. Under the circumstances, we are authorized to, and in this case have, examined the record in order that we might determine the merits of this appeal, including the evidence, the sufficiency of which we proceed to consider.

We fail to discover any evidence sustaining the allegation that as an inducement to the execution of the notes Reiniger agreed that the transac-

6. tion wherein such notes were executed should be treated as a mere loan of the credit of the decedent, and that such notes should be required to be paid only from dividends declared on the capital stock, and arising out of the profits from the operation of the mines. Whatever the evidence discloses respecting such an agreement was embodied in certain receipts signed by Reiniger at the time of the execution of some of the notes in suit, and acknowledging the receipt of such notes in consideration of certain shares of the capital stock of the mining com-

pany delivered to Ebner, and to the effect that the notes being paid, the amount thereof paid by decedent should be repaid to him out of the first dividends declared by said company, and that dividends declared on Reiniger's stock might be appropriated for that purpose. The receipts were to the effect that on the payment of the notes by Ebner, and on the declaring of dividends on Reiniger's stock, such dividends should be used to repay Ebner, and Ebner should hold the stock in consideration of his having advanced the amount of money represented by the notes for the use of the company in developing the property. The evidence does not disclose any breach of such agreement, for the reason, as hereinafter indicated, that no dividends have been declared on the capital stock of the company.

Respecting the alleged fraudulent representations, it may be said that there was abundant evidence that

Reiniger represented to decedent that the com-

7. pany was the owner of a number of valuable mining properties in the State of Sonora, Mexico. The burden was on appellee to prove the fraud alleged. A very careful study of the record fails to disclose any evidence that such representations were either false or fraudulent.

In a general way the further and uncontradicted evidence was to the following effect: Prior to the execution of the notes in suit, Reiniger acquired

8. certain mining properties in the State of Sonora, Mexico. Thereafter and before the execution of the notes, the Reiniger Mining and Smelting Company, a foreign corporation, was organized with a nominal capital stock of 2,000,000 shares of one dollar each, about \$900,000 of which was held by Reiniger. Thereafter the company acquired other

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mining properties in the state of Sonora, until it held and owned five mines, some of which to an extent had been worked before either Reiniger or the company acquired them. An early arrangement was made by which Reiniger was constituted the financial agent of the company, and as such was authorized to sell stock at twenty-five cents on the dollar, receiving cash for the company, or taking notes in his own name for the company and to be transferred to it. At different times, as indicated by the dates of the notes in suit, Ebner purchased the stock of the company through Reiniger or his representative, and executed such notes therefor, his holdings as represented by such notes being 16,000 shares, which he or his estate still holds and owns. There was no evidence that such stock had been tendered to the company. In purchasing such stock and executing such notes, although there is no direct evidence to that effect, it is a fair inference that he was induced to do so by representations made by Reiniger that the mining properties owned by the company were exceedingly rich and valuable. These mines were situated several hundred miles from the United States border, and twenty miles from a railroad. At the time of the execution of these notes the company had in mind to complete a wagon road from the mines to the railroad connection for the transportation of machinery and materials to the mine, and the mine products to the railroad, a considerable part of the construction of which road had been completed. The company had employed in and about the mines at different times from fifteen to 125 men, the number at any particular time depending on the ability to supply food and other materials; and had in its employ and actually at work at the mine engineers, assistant engineers and superintendents, who

were receiving substantial salaries. It had constructed substantial buildings, installed machinery, had done considerable work in developing the mines, and had spent in the mining operations something like \$60,000, aside from the road construction. There were many tons of ore that had been actually mined ready for transportation, some of which had been mined by this company, and the rest by those who had worked the mines at an earlier day. This ore was of a nature to produce minerals in paying quantities. The minerals consisted of gold, silver, iron and copper. The company had established at the mine its own assay plant, and tests of the mining products disclosed that they were ore bearing in paying quantities. By the testimony of persons apparently competent to speak it appeared that the mineral producing rock that had been actually removed from place was of the value of several million dollars. On account of civil war in Mexico, which eventually spread to and over the state of Sonora, culminating in President Wilson's advice that all Americans leave Mexico, the company was compelled to suspend operations in 1915. As we have said, the evidence showed that at the time Ebner executed the notes in suit, this company's property was of the value of several million dollars, and that such value would have continued had conditions remained normal, and that, even taking into consideration the unsettled situation in Mexico, such property was of the value of something like \$100,000 after the company was compelled to suspend operations, and that at the time of the trial the company had a substantial accumulation of cash, besides securities owned by it, derived from the sale of corporate stock.

Under such circumstances it is only by speculation

that we would be able to hold that the evidence showed such representations to be false and fraudulent. Although the real facts may be otherwise than as indicated by the evidence, we are impressed that the officers and members of the company believe that the mining properties are intrinsically of great value, and that such value might be translated into tangible profits, were it not for the unfortunate conditions existing in Mexico.

Before the maturity of the notes, the company desired to create a fund to be used in the purchase of additional machinery to be installed at the mines, and to that end the company borrowed \$20,000 on notes signed by the company and certain of its officers and members, and which loan was negotiated through appellant, and also sold the notes in suit to appellant, he paying face value therefor. The fraud not having been proved, it is not necessary for us to consider whether appellant's title is characterized by the elements that constitute a good-faith holding. The evidence failed to establish that appellant is not the real party in interest. We are required to hold that the evidence was insufficient to sustain the finding.

It is urged, also, that the court erred in admitting in evidence defendant's exhibits from one to twenty-five inclusive. These exhibits for the most part

9. consisted of what purported to be written communications from Reiniger to Ebner. Without taking these exhibits up in detail, it is sufficient to say that a number of them were not sufficiently identified to render them properly admissible in evidence.

No question is presented respecting the burden of allegation and proof of the elements of a good-faith holding, where the suit is by an endorsee immediate

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or remote against a maker of a negotiable instrument, and where the defense is fraud or illegality, and also where it is want or failure of consideration. On that question, see *First Nat. Bank, etc. v. Ruhl* (1890), 122 Ind. 279, 23 N. E. 766; *Harbison v. Bank, etc.* (1867), 28 Ind. 133, 92 Am. Dec. 308; *Giberson v. Jolley* (1889), 120 Ind. 301, 22 N. E. 306; *Union Trust Co. v. Adams* (1913), 54 Ind. App. 166, 101 N. E. 741; *Bunting v. Mick* (1892), 5 Ind. App. 289, 31 N. E. 378, 1055; *Bright Nat. Bank v. Hartman* (1915), 61 Ind. App. 440, 109 N. E. 846; *Galvin v. Meridian Nat. Bank, etc.* (1891), 129 Ind. 439, 28 N. E. 847; *Boxell v. Bright Nat. Bank* (1915), 184 Ind. 631, 112 N. E. 3. See, also, §9089d1 *et seq.* Burns 1914, Acts 1913 p. 120, 126.

Judgment reversed, with instructions to sustain motion for a new trial, and with permission to reform the pleadings if desired.

NOTE.—Reported in 117 N. E. 511, 118 N. E. 829. Corporations: distinction between subscriptions for stock and offers or agreements to subscribe therefor, 81 Am. Dec. 392.

KOKOMO STEEL AND WIRE COMPANY v. GRISWOLD.

[No. 9,916. Filed October 11, 1917. Motion to reinstate appeal overruled March 1, 1918.]

MASTER AND SERVANT.—*Workmen's Compensation Act.*—*Appeal.*—*Time for Perfecting.*—As the Industrial Board, under §60 of the Workmen's Compensation Act (Acts 1915 p. 392) has no authority to review an award by the full board, the time for perfecting an appeal begins to run from the date of the award so made, regardless of an attempted review thereof.

From the Industrial Board of Indiana.

Proceedings for compensation under the Work-

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men's Compensation Act by Eugene Griswold against the Kokomo Steel and Wire Company. From an award for applicant, the defendant appeals. *Dismissed.*

Taylor, Carter & Wright, for appellant.

John O. Spahr and Samuel W. Huls, for appellee.

HOTTEL, C. J.—This is an appeal from an order of the Industrial Board of Indiana. Appellee has moved to dismiss the appeal on the ground that it was not perfected within thirty days from the date of the final award made by said board.

The record discloses the following facts: On January 22, 1917, a hearing of said cause was had "before the full Industrial Board of Indiana," and after considering the evidence such full board rendered its finding and made a final order and award which is set out in full. On January 27, 1917, appellant filed its application for review by such full board on the grounds: (1) That said award is not sustained by the evidence; (2) that said award is contrary to law. It appears from an indorsement on the back of said application, as set out in the record, that on February 10, 1917, said cause was taken up for review by such full board, argument was heard thereon, after which said cause was taken under advisement by such board. Following this, the record shows an entry of date February 19, 1917, in which (we quote from appellant's brief) "the full board made and entered its finding of facts and ruling of law and its award upon review in the exact language of the original award theretofore entered on the 22nd day of January, 1917."

The transcript was filed March 19, 1917. This record presents the exact question which this court had before it in the case of *Kingan & Co. v.*

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Buford (1917), 65 Ind. App. 182, 116 N. E. 754, in which it was held that under §60 of the Workmen's Compensation Act (Acts 1915 p. 392), the right of review in such cases by the full board is authorized only in cases where the original hearing and award was by less than the full board. It follows that the original finding and award in this case is the final award of said board, from the date of which the time for perfecting the appeal began to run, and that the appeal not having been perfected within thirty days from such date, it must be and is dismissed.

NOTE.—Reported in 117 N. E. 265. Workmen's compensation: review and appeal under act, L. R. A. 1916A 163, 266, 1917D 186.

HUBBARD v. FIRST STATE BANK OF BOURBON ET AL.

[No. 8,801. Filed December 19, 1916. Rehearing denied April 4, 1917. Transfer denied March 1, 1918.]

1. **BILLS AND NOTES.**—*Incomplete Note.*—*Negotiability.*—A note, incomplete by reason of the omission therefrom of the date of execution and the name of the payee, is not negotiable under the law merchant in Indiana. p. 57.
2. **BILLS AND NOTES.**—*Incomplete Note.*—*Negotiability.*—*Statutes.*—A note, incomplete by reason of the omission of the date of execution and the name of the payee, is negotiable under §§9071, 9072 Burns 1914, §§5501, 5502 R. S. 1881, so as to vest the property in an assignee or *bona fide* holder for value. p. 57.
3. **BILLS AND NOTES.**—*Bill of Exchange.*—*Action Against Drawer or Indorser.*—*Evidence.*—A *bona fide* holder for value of a purported bill of exchange, which does not show to whom it is payable, may maintain an action thereon against the persons who executed or indorsed it, and under appropriate averments may show by parol from whom the consideration moved, to whom the instrument was delivered by the maker or indorser, and who is in fact the owner and *bona fide* holder, and all facts attending the execution and transfer of the instrument. p. 58.

4. **BILLS AND NOTES.—Action on Incomplete Note.—Supplying Omissions.—Evidence.**—Though a note is incomplete by reason of the absence of the name of the payee and the date of execution, it may nevertheless support a valid obligation, and in a suit thereon, under allegations in the complaint that the omissions were by mutual mistake of the parties, the date of execution could be properly inquired into and ascertained from the evidence. p. 59.
5. **BILLS AND NOTES.—Actions on Incomplete Note.—Issues.—Evidence.**—In an action against the maker and indorser of a note from which the name of the payee and the date of execution had been omitted, where the complaint alleged that the omissions were by mistake of the parties and the scrivener and that the note was given to be used as collateral security, evidence showing the circumstances under which the note was signed, and the intention of the parties was admissible. p. 63.
6. **BILLS AND NOTES.—Negotiable Note.—Assignment.—Right to Sue.—Statutes.**—Under §§9071, 9072 Burns 1914, §§5501, 5502 R. S. 1881, providing that all promissory notes, bills of exchange, etc., signed by any person who promises to pay money, shall be negotiable by indorsement and that the assignee may recover in his own name, where one furnished the money intended to be raised by the use of an incomplete note, he obtained a definite interest in the note which he could assign to a bank for a valuable consideration, whereby it became the real party in interest and entitled to collect whatever was due upon the obligation. p. 64.
7. **PLEDGES.—Incomplete Promissory Note.—Use as Collateral Security.—Effect.**—In executing a promissory note, which was to be used as collateral security and which was incomplete by reason of the absence of the date of execution and the name of the payee, the maker authorized its use as collateral security for a loan of any amount obtainable for any period of time within the three years the note was to run before its maturity. p. 64.
8. **PRINCIPAL AND SURETY.—Accommodation Note.—Discharge of Surety.**—Where the continued use of a note as collateral security without an indorsement was fully within the intention of the parties and the plan originally adopted for raising the money to which a maker lent his name for the accommodation of a technical institute, the acceptance of the renewal note without the indorsement of the president of the institution did not in any way violate the maker's contract so as to discharge him from liability. pp. 64, 65.
9. **PRINCIPAL AND SURETY.—Departure from Contract.—Discharge of Surety.**—A surety is relieved from his contract by dealings or arrangements between his principal and the creditor, to which

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he is not a party, and which constitute a departure from the contract which may possibly vary or enlarge his liability without his consent. p. 65.

From Marion Superior Court (88,900); *Charles Orbison*, Judge.

Action by the First State Bank of Bourbon, Indiana, against William H. Hubbard and James H. Matchett. From a judgment for plaintiff against both defendants, and for defendant Matchett on his cross-complaint against defendant Hubbard, Hubbard appeals. *Affirmed*.

Daniel Wait Howe and *George H. Batchelor*, for appellant.

Frederick E. Matson, *Edward E. Gates* and *James A. Ross*, for appellees.

FELT, C. J.—This is a suit on a note by appellee First State Bank against appellee Matchett and appellant Hubbard, in which the bank obtained judgment for \$2,200 and costs against both defendants, and in which appellee Matchett obtained judgment on his cross-complaint against appellant, ordering the property of the latter levied upon and sold to satisfy the judgment before levying upon the property of the cross-complainant.

The complaint is in three paragraphs and there were numerous other pleadings in the case.

Appellant has assigned as error the overruling of his separate demurrer to each paragraph of the complaint; the sustaining of the separate demurrer of appellee, the First State Bank of Bourbon, Indiana, to the sixth, seventh and ninth paragraphs of appellant's answer to the first paragraph of complaint; the sustaining of said appellee's demurrer to the six-

teenth paragraph of answer to the third paragraph of complaint; error in each of the conclusions of law stated on the special finding of facts.

Omitting formal averments, the first paragraph of complaint alleges in substance that on March 1, 1909, the Winona Technical Institute and appellant Hubbard, by their promissory note, promised to pay to James H. Matchett, three years from that date, the sum of \$2,000 with interest and attorney's fees, a copy of which note is made a part of the complaint as exhibit A; that before its maturity Matchett by indorsement on the note transferred and assigned the same to the First State Bank of Bourbon, Indiana, as follows, to wit: "For value received I hereby assign this note to First State Bank (signed) James H. Matchett." That appellant executed said note as surety by indorsing his name on the back thereof; that by reason of the mutual mistake of the parties and the scrivener who wrote the note, the date and name of the payee were left blank; that said note was delivered to said Matchett who was intended to be and in fact was the payee.

"Exhibit A

"\$2,000.00 Indianapolis, Ind., 190..

"Three years after date, we promise to pay to the order of two thousand dollars, with interest at per cent. per annum from until paid, and ten per cent. attorney's fees. Negotiable and payable at the Union National Bank, Indianapolis, Indiana. Value received without any relief whatever from valuation or appraisement laws. The drawers and endorsers severally waive present-

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ment, protest, and notice of protest and non-payment of this note.

“The Winona Technical Institute,

“By S. C. Dickey, President.

“Due

“Endorsements:

Wm. H. Hubbard.”

The gist of the second paragraph of complaint is that on February 20, 1909, the Winona Technical Institute borrowed from James H. Matchett, \$2,000, and executed to him therefor its promissory note due in sixty days; that contemporaneously therewith, and to induce the loan of said money, the Winona Technical Institute and appellant Hubbard executed and delivered to said Matchett, as collateral security for said loan, a certain promissory note, particularly described, and being the identical note set out as exhibit A with the first paragraph of complaint; that said principal note for \$2,000, due in sixty days, was renewed from time to time by the Winona Technical Institute, until on December 17, 1909, a final renewal note for \$2,000, due in sixty days, was executed by it; that before the maturity thereof, and before the maturity of said collateral note, said Matchett for value received sold and assigned both of said notes to appellee First State Bank, and duly assigned said collateral note to it by indorsement on the back thereof as follows:

“For value received, I hereby assign this note to the First State Bank.

“(Signed) James H. Matchett.”

That thereafter the Winona Technical Institute became insolvent, and a receiver was appointed who

took charge of its property; that said First State Bank filed with the receiver its claim on the principal promissory note aforesaid, but no part of the same has been paid, and said company is insolvent and does not have assets sufficient to pay said debt or any part thereof; that by reason thereof, said collateral note so indorsed by appellant is due and unpaid.

The third paragraph of complaint is substantially the same as the second, except it is averred therein that the note sued upon was executed by appellant for the accommodation of the Winona Technical Institute to enable it to borrow money upon its own individual note by using said note of appellant as collateral security, and thereafter on February 20, 1909, it borrowed from James H. Matchett, on its individual note, \$2,000, and gave the note in suit as collateral security therefor.

The memorandum accompanying the separate demurrer to each paragraph of the complaint alleged that neither paragraph states facts sufficient to constitute a cause of action against appellant, because: (1) The note sued on fails to show the date of its execution; (2) it fails to show when it is payable; (3) it fails to show to whom it is payable; (4) the averments fail to show appellant liable on the note either as principal, surety or indorser; (5) the allegations fail to show that due diligence was used by appellee bank to collect said note of the Winona Technical Institute, the principal thereof.

To the first paragraph of complaint appellant filed answer in ten paragraphs, the first of which was a general denial. The others, except the sixth, seventh, and ninth, in substance allege that appellee First State Bank is not the real party in interest; that appellee James H. Matchett is the real party in inter-

est; want of consideration; payment; that when appellee Matchett took the renewal or second principal note from Winona Technical Institute, he accepted the same without the indorsement of S. C. Dickey, who had indorsed the first principal note. The substance of the sixth paragraph of answer is that in 1908, Winona Technical Institute requested appellant to sign the note sued upon as an accommodation indorser to enable it to use such note as collateral security in borrowing money; that thereupon, without any consideration therefor, he signed said note as such accommodation indorser and delivered the same to Winona Technical Institute. The answer then alleges the borrowing of the money, the execution of the note on February 20, 1909, by Winona Technical Institute to Matchett for \$2,000, due in sixty days, and that the note was indorsed by Solomon C. Dickey; that the note now sued on was used as collateral security for said note of February 20, 1909; appellee Matchett accepted in payment of said note of February 20, 1909, a note of like amount, due in sixty days, signed by Winona Technical Institute, but not indorsed or signed by said Dickey; that Matchett fraudulently assigned the note sued on to appellee First State Bank, after its maturity, to enable said bank to collect same as a *bona fide* holder for value, and to avoid defenses thereto against appellee Matchett. The seventh paragraph of answer is substantially like the sixth, except instead of alleging the second principal note was accepted as payment of the first, it is charged that the time of payment was extended without the knowledge or consent of appellant. The ninth paragraph is the same as the sixth, except the additional averment that the second principal note was accepted in payment of the first, and likewise the

third in payment of the second; that Matchett wrote upon the face of the second note "Paid, June 16, 1909, J. H. Matchett," and surrendered same to Winona Technical Institute. The answers to the second and third paragraphs of complaint were in the main similar to those addressed to the first paragraph. The sixteenth paragraph, addressed to the third paragraph of complaint, in substance charges that appellant executed the note sued on without any consideration and as an accommodation indorser only, and then sets out in detail the facts as above shown in regard to the several renewal notes for the money borrowed from Matchett.

Issues were joined on the affirmative paragraphs of answer and appellant also filed a cross-complaint, in which he sought to have the note sued on adjudged paid and satisfied, and he also asked an order directing the holder thereof to deliver the same to him, and that appellee Matchett be enjoined from transferring the same. Appellee Matchett also filed a cross-complaint against appellant, in which he sought to have any judgment rendered upon the note in suit direct that the property of Winona Technical Institute and of appellant be first levied upon and exhausted before such judgment be enforced against him. Issues were duly joined on all the pleadings, and on due request the court made a special finding of facts and stated its conclusions of law thereon.

The court found the facts to be substantially as alleged in the complaint, and we therefore set out only such portions of the finding as deal with questions that were in any way controverted at the trial. The finding shows the execution of the note in the form above set out on January 20, 1909; that appellant on request of Winona Technical Institute indorsed

his name on the back thereof, and authorized Solomon C. Dickey, president of said institute, to deliver and pledge said note as collateral security to any person, firm or corporation who might thereafter loan money to it, and authorized said Dickey to fill all blanks left in said note by inserting therein the date and the name of the payee or person from whom such loan should be procured; that no consideration moved to appellant for such indorsement, and he executed the note only for the accommodation of Winona Technical Institute; that at the time the note was so executed it was not known how much money would be borrowed, nor that the same would be procured from said Matchett; that the sum of \$2,000 was borrowed from Matchett on February 20, 1909, and the note of the institute given therefor by S. C. Dickey, president, due in sixty days, which note was indorsed by S. C. Dickey, and the note executed by appellant was delivered to appellee Matchett as collateral security for such loan; that at the time of the delivery of said collateral note to Matchett said Dickey neglected to fill the blanks therein, and nothing was said on that subject by the parties to the transaction. The finding also shows the execution of the renewal note on April 21, 1909, without the indorsement of Dickey, and the several renewal notes as alleged; that the note in suit was left as collateral security for said loan from February 20, 1909, with each of said renewal notes, and on each of such renewal notes there was written, "Hubbard note as collateral," and the same was a separate undertaking for the payment of the loan aforesaid; that appellant had no knowledge until more than two years after the execution of the sixth renewal note on December 17, 1909, of the execution of the former notes for said loan, or that the note of

February 20, 1909, had been indorsed by S. C. Dickey, or that the note so indorsed had been surrendered by appellee Matchett to the institute; that prior to June 14, 1912, appellee Matchett sent the note in suit to the Continental National Bank of Indianapolis for collection, and the same was returned unpaid; that on June 14, 1912, Matchett sold, assigned, transferred and delivered the sixth renewal note aforesaid to appellee bank, for value received, and at the same time delivered to said bank the note in suit duly assigned as alleged. The finding then sets out efforts to collect the note and some correspondence between Matchett and appellant in 1910 and 1912, in regard to the collection of the note and appellant's liability thereon and appellant's refusal to pay the same; that when the note of February 20, 1909, became due S. C. Dickey was solvent and able to pay the debt; that this suit was brought on November 14, 1912; that the debt for which the note in suit was held as collateral security is due and unpaid, and likewise the note sued on in this action; that it was the intention of appellant and of said Dickey that the name of the person, from whom the loan should be procured, as contemplated when the note in suit was executed, should be inserted in the blank left for the name of the payee of the note, and that the date should be inserted to correspond with the date on which such loan was obtained, and that the failure to do so was due to the oversight and omission of said Solomon C. Dickey; that it was intended that the name of James H. Matchett should be inserted as payee of the note, and that the date thereof should be February 20, 1909.

The court stated its conclusions of law in substance as follows: (1) The law is with the plaintiff (appellee bank), and it is entitled to recover from James H.

Matchett and William H. Hubbard the sum of \$2,200; (2) Matchett is entitled to the relief prayed in his cross-complaint; that the property of said Hubbard be first exhausted before the property of said Matchett be levied upon to pay and satisfy the judgment. The judgment follows the conclusions of law.

The principal questions arising upon the rulings of the court on the demurrers to the pleadings are identical with those presented by the exceptions to the conclusions of law and the assignment based thereon, and for that reason they will be considered together.

The first question suggested is based on the incompleteness of the note sued on by reason of the absence therefrom of the date of its execution and the name of the payee. The note in its incomplete form

1. is not negotiable under the law merchant in this state. *Gilpin v. People's Bank* (1909), 45 Ind. App. 52, 90 N. E. 91, and cases cited; *Nicely v. Commercial Bank, etc.* (1896), 15 Ind. App. 563, 44 N. E. 572, 57 Am. St. 245; *South Whitley Hoop Co. v. Union Nat. Bank* (1912), 53 Ind. App. 446, 101 N. E. 824; *Mitchell v. St. Mary* (1897), 148 Ind. 111, 113, 47 N. E. 224; *Glidden v. Henry* (1885), 104 Ind. 278, 1 N. E. 369, 54 Am. Rep. 316; 1 Daniel, Negotiable Instruments (6th ed.) §§83, 84, 99, 102, 103.

The note sued on is an "instrument in writing" given for the payment of money, and is negotiable under the statute so as to vest the property

2. thereof in an assignee or *bona fide* holder thereof for value. §§9071, 9072 Burns 1914, §§5501, 5502 R. S. 1881; *McWhorter v. Norris* (1893), 9 Ind. App. 490, 493, 34 N. E. 854, 37 N. E. 21; *Krieg v. Palmer Nat. Bank* (1912), 51 Ind. App. 34, 39,

95 N. E. 613; *Melton v. Gibson* (1884), 97 Ind. 158; *Mitchell v. St. Mary, supra*.

It is not seriously contended that the execution and delivery of the note in its incomplete form authorized a *bona fide* holder thereof to insert the date and fill in the name of the payee in the appropriate blank left therefor in the note, but that, inasmuch as neither the date nor the name of the payee were actually so inserted, appellee bank acquired no right of action by reason of the alleged assignment and transfer of the note to it by appellee Matchett.

In the absence of averments to show that the holder of such note acquired the same for value and was the owner thereof and the real party in interest in the suit, there is authority supporting the contention that a suit on such instrument payable otherwise than to bearer, cannot be maintained by the holder thereof, and that in the absence of such special averments proof of the instrument in such form will not support an action by the holder thereof to recover thereon. *Greenhow v. Boyle* (1843), 7 Blackf. 56; *Rich v. Starbuck* (1875), 51 Ind. 87, 89, and cases cited; 1 Daniel, *Negotiable Instruments* (6th ed.) §§ 142, 145.

But a *bona fide* holder for value of an instrument purporting to be a bill of exchange, which does not on its face show to whom it is payable, may

3. maintain an action thereon against the persons who executed or indorsed such instrument, in its incomplete form, and under appropriate averments may show by parol proof from whom the consideration moved, to whom the instrument was delivered by the maker or indorser, and who is in fact the owner and *bona fide* holder thereof, and all the facts

and circumstances attending the execution and transfer of the instrument.

In such cases the intention of the parties who put the instrument in circulation is the underlying and controlling principle, and when such intention is ascertained, either from the face of the instrument or by proof of extraneous facts, or from all of such sources, it should be followed, unless it contravenes some rule of law, for by so doing effect will be given to the letter and spirit of our Code, which requires actions to be brought in the name of the real party in interest. *Rich v. Starbuck, supra*; *Moore v. Pendleton* (1861), 16 Ind. 481, 483; *Ferry v. Jones* (1858), 10 Ind. 226; *Clark v. Walker* (1841), 6 Blackf. 82; *Gothrapt v. Williamson* (1878), 61 Ind. 599; *Wells v. Jackson* (1841), 6 Blackf. 40.

The absence of a date on the note in question *prima facie* renders the time of payment uncertain and affects the negotiability of the instrument,

4. but it may nevertheless support a valid obligation, and under the pleadings in this case the date could be properly inquired into and ascertained from the evidence. *Bank of Houston v. Day* (1909), 145 Mo. App. 410, 122 S. W. 756, 758; 1 Daniel, Negotiable Instruments §§83, 84, 143, 144, 145; 2 Am. and Eng. Ency. Law 255.

Appellant contends that, if liable at all, he is only liable as an indorser and entitled to all the rights and protection the law accords an indorser; that neither the facts pleaded nor found show such diligence on the part of the appellee bank as will establish liability against him.

Therefore we must determine the character of appellant's liability, if any, on the note under the peculiar facts of this case. While the facts are some-

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what unusual, we believe the question is settled in Indiana under facts so analagous as to render the decision conclusive as to the nature and character of appellant's liability, and to show that he is liable primarily as a maker or surety, and not as an indorser. *Pool v. Anderson* (1888), 116 Ind. 88, 18 N. E. 445, 1 L. R. A. 712; *Oyler v. McMurray* (1893), 7 Ind. App. 645, 649, 34 N. E. 1004; *De Pauw v. Bank of Salem* (1891), 126 Ind. 553, 555, 25 N. E. 705, 26 N. E. 151, 10 L. R. A. 46; *Kealing v. Vansickle* (1881), 74 Ind. 529, 532, 39 Am. Rep. 101; *Wells v. Jackson*, *supra*.

In *Pool v. Anderson*, *supra*, Pool sued Spradling, Neff and Anderson on a nonnegotiable promissory note. Spradling and Neff signed the note on its face, and Anderson wrote his name across the back before it was delivered to Pool, the payee, who brought the suit. Anderson demurred to the complaint, and the court sustained the demurrer on the theory that he was liable as an indorser only and the complaint did not show facts sufficient to fix liability against him. Judge Mitchell wrote the opinion of the court, reversing the judgment, and, among other things, said: "The present case involves the liability of a stranger, who signed his name upon the back of a paper not negotiable by the law merchant, before it was delivered to the payee, who held the same when the suit was commenced. The inquiry is, What is the liability or obligation of one who thus signs to the payee? The decisions of different courts present an irreconcilable conflict of views upon the general subject under consideration. It will be noted, however, that the cases in other jurisdictions relate almost exclusively to notes negotiable as inland bills of exchange. Whatever diversity exists in the decided cases, it cannot be doubted that a stranger who writes his

name on the back of a promissory note before it is delivered, whether it be negotiable or nonnegotiable according to the law merchant, does so in order to give the maker credit, or the note currency, and with the intention to pledge himself in some shape for its payment. *Eilbert v. Finkbeiner*, 68 Pa. St. 243. All the authorities concur in holding that the act constitutes a contract which is to be construed in such a way as to render it available to carry into effect the intention of the parties, consistent with settled rules of law. *Good v. Martin*, 95 U. S. 90; *Rey v. Simpson*, 22 How. 341; 15 Cent. L. J. 82." The learned judge then reviewed the decisions on the subject beginning with *Wells v. Jackson*, *supra*, and pointed out certain inconsistencies in the decisions, and finally adopted the rule declared in *Wells v. Jackson*, *supra*, to the effect that the blank indorsement of nonnegotiable paper, made at or prior to its delivery, and unexplained by extrinsic testimony, confers upon the payee the authority to hold the indorser primarily liable on the original contract, as a surety or joint promisor, but that a similar unexplained indorsement of paper negotiable under the law merchant renders such indorser liable only as an indorser, with the usual and ordinary rights and privileges incident thereto. "But that in either case, the liability designed to be assumed, and the authority intended to be given by the indorsement, may be explained by the attendant circumstances, and the *prima facie* responsibility be changed into one of another kind." Continuing, the opinion of Judge Mitchell states: "The proposition * * * must resolve itself into the following inquiry: Can a stranger who signs an ordinary promissory note not negotiable by the law merchant, under the circumstances disclosed in the pres-

ent case, stand in the relation of an indorser to the payee to whom it is afterwards delivered, without a special contract to that effect? Upon principle there can be no other than a negative answer to this question. This conclusion follows from the fact that the liability of one whose name appears upon a promissory note, no matter when or where it is written, or what the character of the note is, must depend upon a contract which is either expressed in words or implied by law. *Seymour v. Mickey*, 15 Ohio St. 515. When a person other than the payee or indorsee signs his name upon the back of a note governed by the law merchant, before it has its inception, it may, without great impropriety, be held that commercial law supplies the undertaking into which he enters with the payee, which is in effect that if the maker fails to pay at maturity and the indorser is duly notified of the dishonor of the note, he will pay it. This, according to the rulings of this court, is the implied or commercial contract which the law imports into the transaction, in the absence of an express agreement of a different character, and a contract implied by law is as binding as if it were written in words. *Stack v. Beach*, 74 Ind. 571. To these rulings we adhere. This constitutes the person so signing, as between himself and payee, *prima facie* a first indorser. *Kealing v. Vansickle*, *supra*, 1 Daniel Neg. Inst., sections 714, 666. One cannot, however, become an indorser, in a commercial sense, of paper that is not negotiable according to the law merchant. *Vore v. Hurst*, *supra*; 1 Daniel Neg. Inst., section 709. Hence, the signature of a third person placed on the back of a note not so negotiable, before its delivery to the payee, creates no implied or commercial contract whatever. *Chaddock v. Vanness*, 35 N. J. L. 517. As has been re-

marked, it will be assumed that one who signs his name upon the back of a note, whatever its description may be, does so for some purpose, and that he intends to become responsible for its payment in pursuance of some contractual obligation. If, therefore, the law imports into the transaction no contract whatever, and there is no possibility of raising the ordinary obligation of an indorser, it must be assumed, until it appears whether any contract different from that written on the paper was entered into, and what the character of that contract was, that all those, other than the payee, who signed before the execution of the paper, whether upon the back or face, intended to become bound according to the terms of the note as joint promisors. * * * Our conclusion, therefore, is, that when a person not the payee of a note, such as that involved in the present case, places his signature on the back of the paper at or prior to the time of its inception, without making an express contract defining the nature and extent of his undertaking, he will be held liable according to the rule in *Wells v. Jackson, supra*, upon the original contract, as a surety or joint promisor. This conclusion renders the stipulation in the note waiving notice of nonpayment wholly immaterial, as such a stipulation is relevant to notes governed by the law merchant, and which are capable of strict indorsement. A surety or joint promisor is bound to take notice of the default of his principal. As to either, notice of nonpayment is not necessary. *Fitch v. Citizens Nat'l Bank, supra; Scott v. Shirk, 60 Ind. 160.*"

The essential facts in the case of *Pool v. Anderson, supra*, are found in the case at bar, and the

5. fact that the name of the payee was not actually inserted is not a material difference. The

complaint warranted the proof of the circumstances under which the note was signed, the intention of the parties and the object to be attained.

Appellee Matchett, having furnished the money intended to be raised by use of the note in suit, obtained

a definite interest in such note which, under

6. our statute, he could, and the findings show did, assign to appellee bank for a valuable consideration, whereby it became the real party in interest and entitled to collect whatever is due upon the obligation held as collateral security for the unpaid debt. §§ 9071-9072 Burns 1914, *supra*. 1 Daniel, Negotiable Instruments (6th ed.) §748; *Hawkins v. Fourth Nat. Bank* (1897), 150 Ind. 117, 122, 49 N. E. 957; *Mitchell v. St. Mary, supra*.

In executing the note sued on, appellant authorized its use as collateral security for any loan of any amount for any period of time obtainable

7. within the three years the note was to run before its maturity. By renewing the notes for which the note in suit was pledged as collateral security, the contract entered into by appellant was not changed, his liability was not increased, nor

8. the time of payment extended. The acceptance of the renewal note without the indorsement of Solomon C. Dickey, under the circumstances shown, did not in any way affect or violate the contract into which appellant had entered, for the continued use of the note in suit as collateral security without such indorsement, was fully within the intention of the parties and the plan originally adopted for raising the money to which appellant lent his name for the accommodation of the Winona Technical Institute.

The underlying principle by which a surety may be relieved from his contract by dealings or arrange-

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ments between his principal and the creditor,
 9. to which he is not a party, is that there has been a departure from the contract which may possibly vary or enlarge his liability without his consent.

The debt was not paid by the renewals but remained the same throughout. The signing of the first note by Dickey and his failure to indorse subsequent renewal notes were purely incidental

8. matters, wholly unknown to appellant at the time of their occurrence, and entirely foreign to the contract by which he obligated himself when he signed and delivered the note under the circumstances shown in the case. 2 Brand, Suretyship (2d ed.) §§388-397; Jones, Collateral Security §541, and cases; 1 Daniel, Negotiable Instruments (6th ed.) §748; *King v. Doane* (1890), 139 U. S. 166, 11 Sup. Ct. 465, 35 L. Ed. 84, 87; *Hawkins v. Fourth Nat. Bank, supra*; *Dayton Nat. Bank v. Merchants' Nat. Bank* (1881), 37 Ohio St. 208; *Malbon v. Southard* (1853), 36 Me. 147; *Delaware, etc., Ins. Co. v. Haser* (1901), 199 Pa. 17, 48 Atl. 694, 85 Am. St. 763; *Bangs v. Strong* (1843), 7 Hill (N. Y.) 250, 42 Am. Dec. 64.

From the foregoing we have reached the conclusion that the court did not err in any of the rulings on the demurrers to pleadings complained of nor in its conclusions of law stated on the finding of facts. Judgment affirmed.

McNutt, Hottel, Caldwell, Ibach, JJ., and Moran, P. J., concur.

NOTE.—Reported in 114 N. E. 642. Bills and notes: renewal note as discharge of original, Ann. Cas. 1915A 1084; negotiable note, what constitutes, Ann. Cas. 1912D 4. See under (1) 3 C. J. 1434; (2) 10 Cyc 381; (4) 17 Cyc 425.

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— SMITHSON v. BOUSE ET AL.

[No. 10,045. Filed March 12, 1918.]

1. **DEEDS.—Delivery.—Evidence.—Deposit in Safety Deposit Box.**—Where decedent executed a deed to his daughter and placed it, together with other papers, in a safety deposit box, without any explanation as to the nature of the papers and without giving any direction as to their disposition, and he received the only key which would open the box, when used in conjunction with the bank's master key, there was no delivery of the deed and it was ineffective to convey title, since it remained in the possession and under the control of decedent. p. 72.
2. **DEEDS.—Delivery.—Evidence.**—Evidence of decedent's declarations of his intention to give certain lands to his daughter is insufficient to establish the delivery to the daughter of a deed conveying such land. p. 75.
3. **DEEDS.—Delivery.**—To constitute a delivery of a deed it must pass under the power of the grantee, or some one for his use, with the consent of the grantor. p. 75.
4. **DEEDS.—Delivery.—Necessity.—Intention to Convey.—Materiality.**—A daughter of a decedent cannot recover land by virtue of her father's undelivered deed to her, although the evidence may clearly show that it was decedent's intention to give her the land in question. p. 76.
5. **QUIETING TITLE.—Action Predicated on Deed.—Evidence.**—In an action to quiet title in decedent's daughter, who claimed ownership under a deed from her father, receipts from other children of decedent wherein they acknowledged that they had received and accepted certain property from their father in full of their share of the real estate then owned, or which might thereafter be acquired, was properly excluded as being immaterial. p. 76.

From Wells Circuit Court; *William H. Eichhorn*, Judge.

Action by Ella Dawley Smithson against Bertha Bouse and others.

From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Abram Simmons and Charles G. Dailey, for appellant.

Frank W. Gordon and L. B. Simmons, for appellees.

BATMAN, P. J.—This is an action by appellant against appellees to quiet title to real estate. The complaint is in three paragraphs. In the first paragraph appellant bases her action on a legal title. In the second paragraph she bases her action on an equitable title. In the third paragraph she bases her action on a legal title acquired by a certain deed executed to her by one Horace Dawley. The appellees, other than Francis M. Reynolds, filed an answer in general denial, and the latter filed a disclaimer. The case was tried by the court without the intervention of a jury, and judgment was rendered against appellant, and in favor of appellees for costs. Appellant filed a motion for a new trial on the grounds that the decision of the court is not sustained by sufficient evidence and is contrary to law, and that the court erred in excluding certain evidence. Appellant has assigned errors by which she challenges the action of the court in overruling her motion for a new trial.

On the trial it was admitted that one Horace Dawley was the owner of the real estate in question on December 23, 1913. Appellant claims to be the owner of the same by virtue of a deed of that date, executed to her by said Dawley. The preparation, signing and acknowledging of such a deed is not denied by appellees, but they claim that the same was never delivered, and base their defense on such fact. This requires a consideration of the evidence, as the delivery of such deed is the vital question in the determination of this appeal. The only evidence on the trial of the case was introduced by appellant and was,

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in effect, substantially as follows: Appellant and her sister, Arla Miles, were the daughters of one Horace Dawley. He was also the father of certain of the appellees. On December 23, 1913, he was the owner in fee simple of a certain 200-acre tract of land in Wells county, Indiana. On said date he went to the home of William Bloxsom, a neighbor, and had him prepare two deeds, one describing eighty acres of said tract, and naming appellant as the sole grantee; and the other describing the remaining 120 acres of said tract, and naming her sister, Arla Miles, as the sole grantee. At that time he stated in substance that he wanted to make deeds to Ella and Arla for this farm; that he wanted the girls to have the land; that he wanted them to have the deeds, and wanted Mr. Bloxsom to write them; that he wanted to change his will a little bit; that the two girls wanted the land in place of the money; and that he wanted Ella to get the eighty acres and Arla the 120 acres. He asked Mr. Bloxsom, if he thought the buildings on the eighty acres would make up the difference in values between the two tracts, and was told that he believed that they would. Mr. Bloxsom also prepared a will for Mr. Dawley at the same time. Prior to the preparation of such deeds he stated that he was going over to Mr. Bloxsom's to make a deed to Ella and Arla; that he had only given them a house in Montpelier, while he had given the other girls a farm apiece; and he thought he would give Ella the north eighty acres and Arla the 120 acres. After the deeds were prepared he stated that he had made the deeds to Ella and Arla to the farm, and that he wanted the girls to have the deeds. Later, in speaking of his will, he said: "I believe I have got mine so it is divided among the children alike. Some has more land than others, and

others has got money." A short time before his death he stated that he had given some property to his other children, but he had never given Ella and Arla anything; that he intended to give them the land, the eighty acres to Ella and the 120 acres to Arla, in order to make his children equal; that he had given certain of his children their land, and that he intended to share them equally as nearly as he could. In December, 1913, he took such deeds and will to an attorney, where they were examined, and his signatures to the deeds were acknowledged before a notary public, and his signature to the will was witnessed. On this occasion he stated that the papers were as he wanted them; that he was going to Florida and wanted everything fixed properly so he would not be bothered with them again, and if anything happened there would be no trouble of any kind; that the other children had been provided for; that he had given them property and money; that Ella and Arla had not received to his notion as much as the others, and that he wanted them to have the property deeded to them to make them equal with the others. He said: "Of course, I want to have support for myself as long as I live. I want to have some income of my own, but after I am gone I want them to have it." He directed his attorney to indorse something on an envelope, so if anything should happen they would know what should be done with the papers. His attorney then wrote on an envelope, "Deeds to Ella (Dawley) Smithson and Arla (Dawley) Miles. Each deed reserving a life interest to Horace Dawley. Will of Horace Dawley," placed said deeds and will therein, and suggested that he put them in the bank where his daughters would be sure to get them. He said he would do so, and later took said deeds and will to the First Na-

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tional Bank at Montpelier. They were then in a package with other papers three or four inches thick, and tied with a string. He told Mr. Stewart, its cashier, that he was going on a visit, and had some papers he did not care to leave at the house, and wanted to know if they had a place to keep them. He said they might be burned or stolen if they were left at the house. Mr. Stewart informed him that they had a place for such papers, and rented him a safety deposit box in the vault of the bank as a customer. It was one of a number of such boxes kept by the bank for such purpose. The package containing such deeds, will, and other papers was then placed in such box. The box was then locked and the only key thereto was given to Mr. Dawley. There had been another key to the same, but it was lost. There was a guard or master key kept by the bank. The safety deposit box was in a vault upon which there was a combination lock, which was solely under the control of the bank. Mr. Dawley could not get into the box, although he was inside the vault, without first getting the guard or master key of some one in the bank. After the box was locked Mr. Dawley took the key away with him and the box was never opened until after his death. While he had this key there was no means by which any member of the bank could have opened such box, except by breaking the lock. During the time the papers were in the box, Mr. Dawley never asked for any of the contents of the box, or requested a key to get into it. He left shortly afterwards on a visit, but later returned to his home. At the time the papers were placed in the box he dealt with Mr. Stewart, the cashier. He did not examine the package, and did not know what it contained. He had no knowledge that the deeds and will in question

were among them. The papers were never taken out of the box during the lifetime of Mr. Dawley. The first time such cashier saw the package of papers after it was placed in the box was when one of the children of Mr. Dawley came to the bank after his death. He opened the box at their request and found the deeds and will in the envelope, bearing the indorsement placed thereon by Mr. Dawley's attorney, in the package with the other papers. The administrator of the estate of Horace Dawley subsequently requested the papers, and they were turned over to him by the bank. After the papers were placed in the bank Mr. Dawley stated to its president in a general conversation at a blacksmith shop, in answer to a question why he had not given Mrs. Miles a division, that he had made her a deed, and "it is now in your bank." He also stated what property he had given his other children; that it was his intention to treat his children all alike; that he gave Ella and Arla a part of the home farm and that their deeds were "now in your bank." One of the witnesses testified that Mr. Dawley stated to him that he had made deeds to the girls and had put them in the vault in the Farmers' Deposit Bank at Montpelier; that he had figured everything up in his mind to make his children equal; that he did not want to give one more than another; that after he made these deeds he gave to his other children \$500 each to put them on an equality. When the witness asked how the girls were to get these deeds in the bank, Mr. Dawley answered, in effect, that he had appointed an administrator, and when they opened the vault he was to give them the deeds, or they could pick them up, if they were there when the vault was opened, as the deeds were made for them and they were the only ones who had a right

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to them. The deeds, will, and indorsed envelope were also in evidence. Said will made no disposition of said 200-acre tract of land, and named no residuary legatee, but contained, among others, the following provision:

“Item 3. I hereby authorize and appoint my executor to sell the ninety acres of land, in section thirty-two in Nottingham township undisposed of by deed and from the proceeds to give to my beloved son, N. W. Dawley, one thousand dollars and divide the remainder among the following, to-wit: Anna Whitlock, Dora Sarber, N. W. Dawley, Arlie Miles, Ella Smithson and Minnie Swigert equally share and share alike.”

This was substantially all the evidence given on the trial.

It is practically agreed by the parties that before a deed becomes effective to convey title to real estate it must be delivered. The real contention

1. arises over the application of the law in that regard to the facts proved. In the case of *Osborne v. Eslinger* (1900), 155 Ind. 351, 58 N. E. 439, 80 Am. St. 240, the question under consideration was well considered. In the course of the opinion the following rule is stated: “Where the claim of title rests upon the delivery of the deed to a third person, the deed must have been properly signed by the grantor, and delivered by him, or by his direction, unconditionally, to a third person for the use of the grantee, to be delivered by such person to the grantee, either presently, or at some future day, or upon some inevitable contingency, the grantor parting, and intending to part, with all dominion and control over it, and absolutely surrendering his possession and au-

thority over the instrument, so that it would be the duty of the custodian or trustee for the grantee, on his behalf, and as his agent and trustee to refuse to return the deed to the grantor, for any purpose, if demand should be made upon him. And there should be evidence beyond such delivery of the intent of the grantor to part with his title, and the control of the deed, and that such delivery is for the use of the grantee.

If the deed is placed in the hands of a third person, as the agent, servant, friend, or bailee of the grantor, for safe-keeping only, and not for delivery to the grantee; if the fact that the instrument is a deed is not made known to such third person, either at the time it is handed over, or at any time before the death of the grantor; if the name of the grantee, or other description of him, is not given; and if there is no evidence beyond the mere fact of such delivery of the intent of the grantor to part with his control over the instrument and his title to the land, then such transfer of the mere possession of the instrument does not constitute a delivery, and the instrument fails for want of execution." Applying this rule to the undisputed facts, we are forced to the conclusion that the evidence fails to establish a delivery of such deed. The evidence shows that after the deed had been prepared and acknowledged, it was placed in an envelope with the deed to Mrs. Miles and will of Mr. Dawley; that such envelope with its contents was placed with other papers, and tied together with a string, making a package three or four inches thick; that such package was taken by Mr. Dawley to the First National Bank of Montpelier, where he rented a safety deposit box in its vault; that he placed or caused such package to be placed in such box for safe-

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keeping; that such box was then locked, and the key thereto was given to Mr. Dawley; that he retained such key until his death; that said bank had a guard or master key for the boxes in such vault, but such key alone would not unlock such box; that no one could open the box rented to Mr. Dawley, in the absence of the key given to him, without breaking the lock to the same. It thus appears that such deed was not placed in the possession of said bank. It had no control over it for any purpose. True, the box was in the vault of the bank, and the bank had a guard or master key thereto, but the contents of the box remained in the possession and under the control of Mr. Dawley. It is evident that he had a right of access to such box, and to the use of the guard or master key thereto, at any seasonable time. He had the only key which opened the box, in connection with the guard or master key, and had a right to remove its contents at his pleasure. Under such circumstances the bank merely rented him the box and furnished protection for the same by means of its vault, and guard or master key, without exercising or having the right to exercise any control over its contents. Moreover, it should be noted that when Mr. Dawley took such package to the bank he made no explanation of the nature of any of the papers which it contained, and gave no directions as to their disposition. He stated that he was going away on a visit and wanted to leave them there until he came back, giving as his reason that they might be burned or stolen if left at his house. The evidence fails to show that he ever gave any directions to any one at any time for the disposition of such package, or any paper it contained. The facts indicated clearly sustained the conclusion we have reached.

It will be observed that much evidence was introduced on the trial, consisting principally of Mr. Dawley's declarations on the subject, to prove his

2. intention to give the land in question to appellant, but such evidence does not establish the delivery of such deed. As was said in the case of *Fifer v. Rachels* (1901), 27 Ind. App. 654, 656, 62 N. E. 68, 69: "Evidence of one's intention to give certain lands to certain persons, and evidence of the intent to deliver a deed of conveyance, are widely different. The grantor undoubtedly intended that the grantees named in the deed should have the land, but evidence to establish that intention is of little value as going to establish the intention to deliver a deed of conveyance." The case of *Walls v. Ritter* (1899), 180 Ill. 616, 54 N. E. 565, is to the same effect.

Appellant has stated a number of propositions, and cited authorities to support the same, in an effort to show that the evidence established a delivery

3. of the deed in question. The propositions stated, as a rule, are correct, and no doubt were applicable to the varying facts and circumstances of the cases decided, but none which can be accepted as authority in this state in any way impair the well-established rule that to constitute a delivery of a deed it must pass under the power of the grantee, or some one for his use, with the consent of the grantor. *Vaughan v. Goodman* (1884), 94 Ind. 191; *Anderson v. Anderson* (1890), 126 Ind. 62, 24 N. E. 1036; *Pethtel v. Pethtel* (1909), 45 Ind. App. 664, 90 N. E. 102; *Tansel v. Smith* (1911), 49 Ind. App. 263, 93 N. E. 548, 94 N. E. 890; *Stout v. Stout* (1901), 28 Ind. App. 502, 63 N. E. 250; *Emmons v. Harding* (1903), 162 Ind. 154, 70 N. E. 142, 1 Ann. Cas. 864; *Kokomo Trust Co. v. Hiller* (1917), *post* 611, 116 N. E. 332. The

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evidence fails to show that Horace Dawley ever

4. parted with the possession of such deed, or that it ever passed under the control of appellant, or any one for her use. This leaves one of the essential elements of the execution of such deed unsupported by the evidence. Appellant, therefore, cannot recover by virtue of such deed, although the evidence may clearly show that it was her father's intention to give her the land in question.

Appellant also predicates errors on the action of the court in refusing to permit the introduction of exhibits Nos. 5, 6, 7, and 8 in evidence. These

5. exhibits are not uniform in the language used, but all in effect purport to be receipts from certain of the children of the said Horace Dawley, wherein they acknowledge that they have received and accepted certain property from their father, in full of their share of the real estate then owned, or which might thereafter be acquired by him. The subject-matter of these receipts was immaterial on the theory on which the case was presented and determined, viz., that appellant was the owner of the real estate in question by virtue of a deed from Horace Dawley. Had the case been tried on the theory that appellant was the owner of an undivided portion of such real estate by inheritance from her father, the exclusion of such evidence would have presented a different question, but as such theory was not involved on the trial of the cause, no such question is presented here for our determination. We therefore conclude that there was no error in excluding such exhibits.

It is apparent from the evidence that it was the intention of Horace Dawley to give appellant the real estate described in her complaint, and that he fully

believed that he had done everything that was necessary to convey the same to her by the deed in question. The equities, therefore, appear to be strongly in her favor, but we can only determine the questions involved in this appeal, and leave the parties to such other remedies as are available. It is evident that the only question submitted to and determined by the trial court relating to the real estate in controversy was as to appellant's ownership by virtue of the alleged deed from Horace Dawley. No other question in that regard is presented by this appeal, and we have limited our decision to a determination of that question. We have expressly held that appellant did not acquire title to said real estate by virtue of such alleged deed, but in so doing we do not mean to imply that she has no interest of any kind therein. This decision, therefore, must not be construed to be an adjudication of any interest in such real estate, which may have been acquired by any of the parties, as heirs or legatees of said Horace Dawley, or a determination of any question affecting the extent of such interest by reason of any advancements made to any of the parties to this proceedings.

We find no error in the record. Judgment affirmed.

NOTE.—Reported in 118 N. E. 970. Deeds: delivery, 16 Am. Dec. 39, 58 Am. Rep. 289, 53 Am. St. 537; possession by grantor at his death as negating delivery, 44 L. R. A. (N. S.) 528. See under (1) 13 Cyc 562.

VANDALIA COAL COMPANY v. SHEPARD.

[No. 9,119. Filed October 10, 1916. Rehearing denied February 15, 1917. Transfer denied March 12, 1918.]

1. **APPEAL.—Briefs.—Sufficiency.—Waiver of Error.**—Error assigned on the overruling of motion for physical examination of plaintiff is waived, where appellant's brief directs no point or proposition thereto. p. 79.
2. **APPEAL.—Briefs.—Abstract Proposition of Law.—Waiver of Error.**—Error assigned on the overruling of the motion for a new trial is waived, where appellant's brief directs no point or proposition to any specific ground of the motion, but contains only mere general statements which may or may not apply thereto. p. 79.
3. **MASTER AND SERVANT.—Injury to Servant.—Mining.—Complaint.—Sufficiency.—Statutes.**—In an action by a coal miner for personal injuries sustained when the roof of a mine room caved in, allegations in a paragraph of complaint showing that the mine boss failed to furnish sufficient timbers to make the room safe and to inspect the same, as required by §8530 Burns 1914, Acts 1905 p. 65, and that such failure was the proximate cause of the injury, are not nullified by an allegation that there was no apparent danger and that the employee was unable to discover any defects in the roof by the use of the usual and ordinary tests. p. 82.

From Greene Circuit Court; *Theodore E. Slinkard*, Judge.

Action by Charles Shepard against the Vandalia Coal Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Henry W. Moore, for appellant.

Claude E. Gregg and *Webster V. Moffett*, for appellee.

FELT, J.—Suit for damages which resulted in a verdict for appellee in the sum of \$1,800. The complaint is in two paragraphs, on which the issues were joined by general denial. Appellant's motion for a new trial was overruled, and it has assigned as error the

overruling of its demurrer to each paragraph of the complaint, the overruling of its motion for a new trial, and also its motion to require appellee to submit to a physical examination and to have an X-ray photograph taken of the injured portions of his body. The gist of the memorandum accompanying the demurrer is that neither paragraph states facts sufficient to show a liability under the statute; that the general averments which tend to state a cause of action are overcome and nullified by the specific allegations of facts; that the allegations show that the defects which caused appellee's injury were inherent in the place he was employed to work and could not have been discovered by appellant "by the usual and ordinary tests."

No point or proposition is directed to the assignment that the court erred in overruling appellant's motion for a physical examination of appellee

1. and for the taking of an X-ray photograph, and the assignment is therefore waived. It appears from the record that this motion was made before the case was set for trial, and was overruled before the trial began. *Pfaffenback v. Lake Shore, etc., R. Co.* (1895), 142 Ind. 246, 248, 41 N. E. 530; *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 626, 103 N. E. 652; *Curry, Gdn., v. City of Evansville* (1913), 56 Ind. App. 143, 104 N. E. 978.

No point or proposition is directed to any specific ground of the motion for a new trial. Mere general statements that may or may not have such ap-

2. plication present no question on appeal, and the assignment that the court erred in overruling the motion for a new trial is likewise waived. *Chicago, etc., R. Co. v. Dinius, supra.* *Mutual Life Ins. Co. v. Finkelstein* (1914), 58 Ind. App. 27, 31,

107 N. E. 557; *Palmer v. Beall* (1915), 60 Ind. App. 208, 110 N. E. 218.

The points and propositions presumably relating to the rulings on the demurrers are general in their character and are not specifically applied to the particular question evidently intended to be presented, but appellee in his brief has sufficiently identified certain questions arising on the demurrers to enable the court to ascertain and pass upon the same.

The gist of the first paragraph of the complaint is that appellant was engaged in the business of mining coal in Greene county, Indiana, and in so doing employed more than ten men; that appellee was employed by appellant and was engaged in operating a machine to undercut the coal, and on the day of his injury was operating said machine in room No. 11 of appellant's mine; that it was the duty of appellant to furnish him a safe place in which to do such work and to keep constantly on hand at said mine a sufficient supply of timbers of suitable lengths to properly secure and make safe the room in which he was required to work; that it was the further duty of appellant by its mine boss to visit and examine each and every working place in said mine at least on every alternate day and see that the same was secured by proper timbers and that a sufficient supply of props, caps and timbers was always on hand at said mine where appellee was working; that appellant did not perform such duties, and negligently failed and refused to furnish the necessary caps and timbers of proper lengths, and negligently failed to visit and examine the mine and see that the same was properly secured by props and timbers and that a sufficient supply thereof was kept on hand for such purpose, and negligently allowed the same to be with-

out such props and timbers for three days prior to appellee's injury, by reason of which failure appellee was unable to prop and make safe the roof of the room where he was working; that by reason of such negligence and failure of appellant the roof of the room where appellee was working became weak and dangerous, which fact was known to appellant, or might have been known by the exercise of reasonable care and diligence; that by reason of such weak and unsafe condition of the roof aforesaid, so caused as aforesaid, on the tenth day of June, 1913, the roof of the mine where appellee was working suddenly gave way, caved in and fell upon appellee and severely injured his hips and legs, the particulars of which are alleged.

The second paragraph contains the same general averments as the first, and also alleges that on June 10, 1913, appellant owned and operated a coal mine and in so doing was engaged in business, trade and commerce within the State of Indiana, and employed therein more than five persons, to wit: 300 persons; that it employed one John Boyce as superintendent of said mine and one Jack Doige as mine boss and Jack McQuade as room boss in that part of the mine where appellee was required to work and was working when injured. •

The failure of appellant to inspect the mine and furnish timbers is alleged in detail; also that appellee made due request of the room boss under whom he worked for the necessary and suitable timbers to be used in making the place safe where he was required to work, four days prior to his injury; that plaintiff used all available timbers and made diligent search for others, but was unable to obtain them; that there

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was a large sand rock in the roof of the room where appellee was required to work which was in an unstable and dangerous condition and liable to fall if not supported by props, all of which was known to appellant, or could have been known by it in the exercise of ordinary care in time to have made the same safe by props prior to the time of appellee's injury; that at and prior to the time of his injury there was nothing in the appearance of said roof to indicate immediate danger, and appellee was unable to find any defect therein by the usual and ordinary tests; that if appellant had performed its duty of inspection and furnished the necessary timbers appellee could and would have made the roof secure and thereby avoided injury.

Appellant contends that the averments of the first paragraph of complaint fail to bring the case within the provisions of §§8580-8585 Burns 1914, Acts

3. 1905 p. 65, for the reason that the allegations show "that at and prior to the time of said injury there was nothing in the appearance of said roof to indicate immediate danger, and he was unable to find any defect therein by the usual and ordinary tests"; that such averments show that full compliance with all the requirements of the statute by appellant would not have enabled it to discover the defects and to have remedied them in time to avoid the accident, and that they also show that appellee would not have used timbers had they been furnished him in due time.

The averments of the first paragraph are sufficient to show that appellant failed to perform two statutory duties, viz., the furnishing of timbers and the inspection of the mine by the mine boss. The discharge of such statutory duties are in no way dependent upon or modified by the ability, the diligence or

want of diligence of the employe in discovering and remedying defects in the place he is required to work and which by the provisions of the statute the employer is bound to make safe in the manner and by the means therein described.

Furthermore, the allegations do not show that appellant could not have discovered the unsafe condition of the roof and made the same secure, but they do show that the defect could have been discovered and remedied by compliance with the statute. The allegations that appellee did not ascertain the immediate danger, and could not by the ordinary tests discover the defect in the roof which caused his injury, fall short of showing that additional props would not have been used by appellee had appellant provided them as required by the statute, and do not show appellee guilty of contributory negligence as a matter of law, by continuing to work under the conditions shown by the averments of the complaint; nor do such averments overcome or nullify the allegations which charge the failure of appellant to perform its statutory duty and show that such failure was the proximate cause of appellee's injury. The first paragraph is sufficient and states a cause of action under the statute. *Peabody-Alwert Coal Co. v. Yandell* (1912), 179 Ind. 222, 100 N. E. 758; *Domestic Block Coal Co. v. DeArmey* (1913), 179 Ind. 592, 100 N. E. 675, 102 N. E. 99; *Vandalia Coal Co. v. Alsopp* (1916), 61 Ind. App. 649, 109 N. E. 421; *Davis Coal Co. v. Pollard* (1901), 158 Ind. 607, 62 N. E. 492, 92 Am. St. 319; *Antioch Coal Co. v. Rockey* (1907), 169 Ind. 247, 82 N. E. 76; *Diamond Block Coal Co. v. Cuthbertson* (1905), 166 Ind. 290, 76 N. E. 1060.

The second paragraph of complaint is sufficient under the Employers' Liability Act of 1911, Acts 1911

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p. 145, §8020a *et seq.* Burns 1914; *Vandalia Coal Co. v. Alsopp, supra*; *Vandalia R. Co. v. Stillwell* (1913), 181 Ind. 267, 104 N. E. 289, Ann. Cas. 1916D 258; *Chicago, etc., R. Co. v. Mitchell* (1915), 184 Ind. 588, 110 N. E. 680.

Judgment affirmed.

NOTE.—Reported in 113 N. E. 767. Master and servant: liability of mine owner to servant for injuries caused by falling of mine roof, Ann. Cas. 1912B 577; duty of mine owner as to props and timbers in mines, 87 Am. St. 588. See under (3) 26 Cyc 1395.

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[No. 9,476. Filed March 13, 1918.]

1. **APPEAL.—Questions Reviewable.—Ruling on Motion for New Trial.—Briefs.—Sufficiency.**—Where, in its points and authorities, under the heading of "Error in Overruling the Motion for New Trial," appellant states a number of general propositions without attempting to specifically apply any of them to any of the grounds of its motion for new trial, appellant fails to strictly comply with the rules of court, but, as each of the grounds of the motion in effect attempts to present the same question, such question will nevertheless be considered. p. 87.
2. **APPEAL.—Review.—Findings.—Consideration of Matters Outside the Record.**—Where the trial court's finding for defendants on their counterclaim was general, the court on appeal cannot consider, in determining the sufficiency of the evidence, the trial court's alleged announcement, which is not shown by the record, as to the items allowed defendants. p. 87.
3. **TRIAL.—Evidence.—Consideration.—Weight and Credibility.**—Though plaintiff's evidence on an issue of fact was undisputed, the trial court had a right to consider all the other evidence in the case, including circumstances and surroundings, that in any way might affect the weight or credibility of such evidence. p. 88.
4. **TRIAL.—Evidence.—Weight and Credibility.**—The trial court has the right to disregard evidence, though uncontradicted, if it considers such evidence unreasonable or inconsistent with

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facts and circumstances shown by the other evidence in the case. p. 89.

5. *CONTRACTS.—Building Contracts.—Construction.—Extension of Time for Owner's Delay.—Necessity of Written Claim.*—Where a building contract provided that, should the contractor be delayed in the prosecution or completion of the work by the act or neglect of the owner, architect, or other contractor, the time for completion should be extended for a period equal to the time lost, but that no allowance for additional time should be granted unless a claim therefor in writing should be presented to the architect, and there was delay by the owners in clearing the site for the building, the contractor was not entitled to additional time where he made no written claim to the architect for an extension as provided in the contract, but merely wrote him a number of letters complaining of the delay. p. 91.
6. *CONTRACTS.—Construction.—Extensions of Time for Owner's Delay.—Architect's Authority to Waive Claim.*—A provision in a building contract stipulating that the architect could allow an extension of time for the completion of the work only in event a written request therefor was filed with him by the contractor was for the benefit of the owner as well as the contractor, and the architect had no power to waive the filing of such claim in writing. p. 94.
7. *CONTRACTS.—Building Contracts.—Payments to Contractor.—Certificate of Architect.*—Under a building contract providing that the sum to be paid for material and work was to be paid by the owner to the contractor only upon certificate of the architect, and that all payments should be due when the certificates were issued, except in case of arbitrary or fraudulent refusal or failure of the architect to issue a certificate for final payment, such payment was not due until a certificate therefor had been issued by the architect. p. 96.

From Marion Superior Court (94,959); IV. IV.
Thornton, Judge.

Action by the William P. Junglaus Company against Mary Josephine Ratti and others. From a judgment for defendants on their counterclaim, plaintiff appeals. *Affirmed.*

Charles O. Roemler, for appellant.

Baker & Daniels, for appellees.

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HOTTEL, J.—This appeal is from a judgment in appellees' favor in an action brought by appellant to recover for labor and materials furnished by it under a contract for the erection of a building on appellees' real estate, and to foreclose a mechanic's lien against such real estate. In addition to the amount alleged to be due on the contract price, recovery was also asked for extra labor and material alleged to have been rendered and furnished by appellant. The complaint is in one paragraph, to which there is an answer in general denial and a plea of payment. Appellees also filed a counterclaim for damages resulting from delay in completion of the work and from alleged defective work. No answer was filed to this counterclaim, but by agreement appellant was permitted to introduce evidence to prove any delay in the prosecution of its work caused by appellees or their agents.

It was agreed at the trial that the contract price for work done by appellant was \$41,903, and that it was entitled to recover for undisputed extras, \$96.42, making a total of \$41,999.42; that as against this amount appellee was entitled to credits for amounts paid thereon, aggregating \$41,110, leaving an undisputed balance due appellant on the items of indebtedness, alleged in its complaint, of \$889.42.

The court found that appellant was entitled to recover said amount on its complaint, and that appellees were entitled to recover on their counterclaim the sum of \$889.50, and rendered judgment for appellees against appellant for eight cents and costs. A motion for new trial filed by appellant was overruled, and this ruling is assigned as error. The following grounds of said motion are relied on for reversal: (1) The decision of the court is not sus-

tained by sufficient evidence; (2) the decision is contrary to law; (3) the damages assessed are excessive; (4) the assessment of the amount of recovery is erroneous, being too large.

In its points and authorities, under the heading, "Error in overruling the motion for new trial," appellant states ten separate general propositions

1. without attempting to specifically apply either of them to any of the said grounds of its motion for new trial. This is not a strict compliance with the rules of the court. *German Fire Ins. Co. v. Zonker* (1914), 57 Ind. App. 696, 108 N. E. 160; *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 103 N. E. 652; *Weidenhammer v. State* (1913), 181 Ind. 349, 103 N. E. 413, 104 N. E. 577.

However, we think it sufficiently appears from said brief that appellant, by each of said grounds of its motion, has, in effect, attempted to present the same question, and such question will therefore be considered. *American, etc., Tin Plate Co. v. Yonan* (1915), 59 Ind. App. 700, 109 N. E. 922; *Richey v. Cleveland, etc., R. Co.* (1910), 47 Ind. App. 123, 93 N. E. 1022.

The decision and judgment, in so far as it can be said to be based on the items of defective work for which damages are asked in the counterclaim, is not questioned, it being conceded that there is some evidence to support each of such items; but it is insisted by appellant that the amount found to be due appellees on such counterclaim is in excess of the total amount claimed therein for defective work.

In this connection it is claimed that the trial court when it made its decision announced that it allowed \$439.50 on account of defective work, and \$450

2. as "penalty" for delay in the completion of the work. The finding, however, is general,

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and it is conceded that the record does not show such announcement, and hence that it cannot be considered by this court, but it is insisted, as before indicated, that it affirmatively appears from the items of the counterclaim and the evidence that the decision and judgment herein is necessarily based in part on damages allowed for delay in the completion of said work. No question is raised as to the period of delay for which the stipulated damages should be computed if allowable, but the sole contention is, in effect, that the undisputed evidence shows that such delay resulted from the default of the owners of the property, and of contractors employed by them, and that therefore appellant should not be held liable for any amount on account of such delay; that to the extent that the decision of the trial court includes an allowance for any amount for such delay, it is not sustained by sufficient evidence and is contrary to law, and that to such extent the assessment of the amount of recovery is erroneous, in that it is too large.

Assuming, without so deciding, that the question indicated is properly presented by one or more of said grounds of its motion for new trial and

3. by its briefs, we will proceed to determine it.

However, it should be first stated that it is questionable whether, under all the evidence in the case, this court can say that the evidence is uncontroverted upon the question of the delay in the completion of the work being caused solely by the default of appellees or contractors employed by them. Though it be granted that the evidence offered by appellant as to the cause of such delays was undisputed, the trial court had a right to take into consideration all of the other evidence in the case, including circumstances and surroundings, that might

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in any way affect the weight or credibility of such evidence. *Cleveland, etc., R. Co. v. Quinn* (1913), 54 Ind. App. 11, 24, 101 N. E. 406.

Appellant's contention admits delay in the completion of the work, and hence under the provision of its contract *infra* it was liable for the damages

provided for therein resulting from such delay,

4. unless it appears that it was caused by the "owner, * * * architect, or * * * any other contractor employed by the owner upon the work," as provided in article VII, *infra*, of the contract. While appellant introduced witnesses who testified in effect that appellees and contractors employed by them caused delays in the completion of said work, the total of which equaled, or more than equaled, the entire delay in such completion, and while these witnesses were not expressly contradicted by other witnesses, their evidence or any part thereof, like any other oral evidence, might have been disregarded by the trial court if the court considered it unreasonable or inconsistent with facts and circumstances shown by the other evidence in the case. *Cotner v. State* (1909), 173 Ind. 168, 89 N. E. 847; *South-ern R. Co. v. Limback* (1908), 172 Ind. 89, 85 N. E. 354; *Cleveland, etc., R. Co. v. Starks* (1914), 58 Ind. App. 341, 361, 362, 106 N. E. 646, and cases cited; *Cleveland, etc., R. Co. v. Quinn, supra*.

However, again assuming, without so holding, that said evidence is in fact uncontroverted, and that neither the trial court nor this court can disregard it, we are of the opinion that an allowance for delay in the completion of the work was properly included in the decision of the trial court, and hence that such decision is sustained by the evidence, and in accord with the law applicable thereto.

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The parties agreed that "Exhibit 1A" was the contract between them. This contract purported to be "The Uniform Contract. Form of Contract Adopted and Recommended for General Use by the American Institute of Architects and the National Association of Builders. * * * Revised 1907." The parts thereof now material are as follows:

"Art. II. It is understood and agreed * * * that the work included in this contract is to be done under the direction of said architects, and their decision as to the true construction and meaning of the drawings and specifications shall be final.

"Art. VI. The contractor shall complete the several portions, and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, to wit: The work to be completed on or before the 1st day of November, 1912. A penalty of fifteen * * * dollars per day will be due the owners for each day after November 1st, 1912.

"Art. VII. Should the contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the owner, of the architect, or of any other contractor employed by the owner upon the work, * * * then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid, which extended period shall be determined and fixed by the architect; but no such allowance shall be made unless a claim therefor is presented in writing to the architect within forty-eight hours of the occurrence of such delay.

“Art. XII. In case the owner and contractor fail to agree in relation to matters of payment, allowance or loss referred to in Arts. III or VIII * * * or should either of them dissent from the decision of the architect referred to in Art. VII of this contract, which dissent shall have been filed in writing within ten days of the announcement of such decision, then the matter shall be referred to a board of arbitration to consist of one person selected by the owner, and one person selected by the contractor, these two to select a third. The decision of any two * * * shall be final and binding on both parties hereto.”

Appellant's first contention is that it should be allowed additional time because of the delay on the part of the owners in clearing the site for the building, which they had agreed to finish by May 20, 1912, the date when appellant was to have begun the work. In the case of *Van Buskirk v. Board, etc.* (1909), 78 N. J. Law 650, 75 Atl. 909, the contract between the parties provided that: “The contractor shall complete the several portions and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, to wit, * * * The entire building to be completed and ready for occupancy by the 15th day of September, 1908, providing, however, that the afore-said owner removes the present building from the proposed site before the 15th of May, 1908.” The contract provided also that “the contractor shall pay to the owner * * * \$25 per day * * * for each and every day's delay that the work shall remain unfinished after the date agreed upon for the

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completion * * *.’” It also contained a provision identical with article VII, *supra*.

Under the terms of this contract, which so far as they are material were almost identical with those of the instant contract, *except that the latter contains no express provision that the owners should clear the site*, it was held that the contractor, because he made no claim in writing to the architect for additional time alleged to have been necessary by reason of the owner’s failure to remove the buildings from the site by May 15, 1908, could not have an extension of time equivalent to such delay, and was liable for the stipulated damages for such period.

There is abundant authority in other states that, under contracts such as the one here involved, where the contractor has not presented his written claim for an extension of time, and such extension has not been granted by the architect, he is not entitled thereto. *Chapman Decorative Co. v. Security, etc., Ins. Co.* (1906), 149 Fed. 189, 79 C. C. A. 137; *Kelly v. Fejervary* (1900), (Iowa) 78 N. W. 828; *Ward v. Haren* (1909), 139 Mo. App. 8, 119 S. W. 446; *Hiller v. Daman* (1914), 183 Mo. App. 315, 166 S. W. 869; *Van Buskirk v. Board, etc., supra*; *Davis v. LaCrosse Hospital Assn.* (1904), 121 Wis. 579, 99 N. W. 351, 1 Ann. Cas. 950; *Curry v. Olmstead* (1904), 26 R. I. 462, 59 Atl. 392; *Lumber Co. v. Friedman* (1908), 64 W. Va. 151, 61 S. E. 815; *Feeney v. Bardsley* (1901), 66 N. J. Law 239, 49 Atl. 443; *J. G. Wagner Co. v. Cawker* (1902), 112 Wis. 532, 88 N. W. 599; *Wait v. Stanton* (1912), 104 Ark. 9, 147 S. W. 446; *Equitable Real Estate Co. v. National Surety Co.* (1913), 133 La. 448, 63 South. 104; *Florida, etc., R. Co. v. Southern Supply Co.* (1900), 112 Ga. 1, 37 S. E. 130; *Jones v. St. John’s*

College (1870), L. R., 6 Q. B. 115; *Grey v. Stephens* (1906), 16 Manitoba 189.

Appellant contends that it notified the architect of the delay caused by the owner, and also of the delays caused by contractors employed by the owners, and that therefore it is entitled, under its contract, to additional time in which to perform. The record shows a number of letters written by appellant to the architect, in which it complained of the delay of the owners in clearing the ground, and of delay and interference by contractors over whom it had no control. In some of these letters appellant stated that it would be delayed in a particular portion of the work by the matters complained of, but in none of them did it claim any extension of time by reason of such matters, nor was such extension in any way mentioned therein.

Article VII, *supra*, provided that should the contractor be delayed by certain happenings therein specified, "Then the time * * * shall be extended for a period equivalent to the time lost * * *, which extended period (i. e., a period equivalent to the time thus lost) shall be determined and fixed by the architect," and that "no such *allowance* shall be made unless a *claim therefor* is presented in writing to the architect." It is plain that this article requires that a claim for an allowance of additional time by the architect must be presented to him in writing, if the contractor would obtain the benefit of such extension. The record does not show that any such claim was made, and appellant, therefore, was not entitled to any extension. Such a provision is for the benefit of the owner, as well as the contractor, and the architect has no power to waive this formality. The

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presentation of the claim in writing is a condition precedent to the architect's power to act in the matter of the extension of time. *Van Buskirk v. Board, etc., supra*, and cases cited; *J. G. Wagner Co. v. Cawker, supra*, and cases cited.

If it be said that the provision requiring the presentation of a written claim is harsh, the answer is well put in the case of *Davis v. LaCrosse Hospital Assn., supra*, 587, 588, in which the court said: "Parties have a perfect right to make harsh provisions in their contracts if they see fit. If they do, courts should not sit to revise them. Their duty is to enforce contracts as they find them, regardless of consequences, when no invalidity is involved nor public policy violated, and no mutual mistake or fraud, nor clear evidence of modification. Stipulations of the kind under consideration are uniformly enforced * * *."

Appellant says that the evidence shows that appellees recovered "penalties" from contractors employed by them to install plumbing, etc., by whom appellant was delayed in completing the work, and that therefore appellees should not be allowed stipulated damages from appellant for the delay so caused. This court cannot say that the judgment appealed from involves such items of allowance, but whether it does or not is immaterial under the stipulations of the contract here involved.

An analysis of the authorities above cited necessitates the conclusion that under such a contract the contractor binds himself absolutely to pay the damages stipulated for any delay in the completion of the work, except such delay as results from the neglect or default mentioned in article VII, *supra*, of such contract; and the contractor cannot be heard

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to say that his delay was caused by the default of those mentioned in said article VII, unless he has duly presented his claim for extension of the time made necessary by such default, as provided in said article.

In the case of *J. G. Wagner Co. v. Cawker, supra*, 538, the court, in considering a provision in a building contract that written claim must be made for extension of time made necessary by default of others, said: "The importance of this stipulation, as well as its purpose, is manifest. The very contest that has arisen in this case demonstrates the necessity of some such cautious provision. Disputes frequently arise between different contractors, or the owner and the architect, as to responsibility for delays in the work. Owners are very much in the power of contractors and architects. To avoid the uncertainty of verbal disputes, and *to prevent the contractors from making claims for delay after the building has been finished*, is clearly the purpose of such provisions. They are for the benefit of both, especially for the owner. The plaintiff knew that it could have no claim for delay for any reason unless it made a claim in writing within twenty-four hours after its occurrence. * * *

As we have already said, the purpose of this stipulation was to protect the defendants from stale claims for delays, which might be based upon oral understandings, and made when it might be difficult to prove the facts in relation thereto." (Italics inserted.)

So, in the instant case, appellant, not having presented his claim in writing for an extension of time, as provided by article VII, *supra*, cannot now be heard to say that its delay was caused by the default of the other contractors who, it is claimed, were re-

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quired to pay to appellees the damages stipulated in their respective contracts.

It is also insisted by appellant that appellees are not entitled to the stipulated damages provided by the contract, because the evidence shows that they committed a breach of said contract. It is claimed that under the contract appellees were to pay for 85 per cent. of the amount of labor and material in the building based upon monthly estimates; that the building was completed December 7, 1912; that no payment was made from November 9, 1912, to February 13, 1913; that the amount unpaid on December 7 was more than \$7,000, no part of which was paid until February 13, at which date only \$4,000 was paid.

The contract provides that the sum to be paid for the material and work "shall be paid by the owner to the contractor * * * only upon certificates of the architect. * * * And all payments shall

7. be due when certificates for the same are issued." Under such a provision, except in case of an arbitrary or fraudulent refusal or failure of the architect to issue a certificate for final payment, the final payment was not due until a certificate therefor had been issued by the architect. *Chicago Athletic Assn. v. Eddy Electric Mfg. Co.* (1898), 77 Ill. App. 204; *Vincent v. Stiles* (1897), 77 Ill. App. 200; *McGlaufflin v. Wormser* (1903), 28 Mont. 177, 72 Pac. 428; *Sheyer v. Pinkerton Construction Co.* (1904), (N. J.) 59 Atl. 462; *Neidlinger v. Onward Construction Co.* (1905), 107 App. Div. 398, 90 N. Y. Supp. 115, 95 N. Y. Supp. 1148, affirmed 188 N. Y. 572, 80 N. E. 1114; *Ashley v. Henahan* (1897), 56 Ohio St. 559, 47 N. E. 573.

The architect testified that he issued no final certificate, and the record does not show that his failure to

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issue such certificate was arbitrary or fraudulent. The record, therefore, does not show that appellees' delay in making the final payment was a breach of the contract.

For the reasons indicated, the judgment below is affirmed.

NOTE.—Reported in 118 N. E. 966.

BORN v. UNION ELEVATOR COMPANY ET AL.

[No. 9,557. Filed March 13, 1918.]

1. **APPEAL.—Review.—Findings of Fact.—Conclusiveness.—Findings of fact supported by substantial evidence are conclusive on appeal.** p. 101.
2. **CONTRACTS.—Sales Contracts.—Attorney's Fees.—Right to Recover.—**Where grain was sold under a written contract upon which was indorsed a receipt for advancements providing for attorney's fees, but the parties subsequently entered into a verbal agreement concerning the sale of grain which did not provide for attorney's fees, and the receipt was satisfied by subsequent transactions, the holder could not recover attorney's fees, though the maker still owed him money on the account. p. 103.
3. **PAYMENT.—Rights as to Application.—Intent of Parties.—Application of Payment by Court.—**Where a debtor owes distinct debts or accounts and he makes a voluntary payment, he may direct its application, but if neither party makes a specific appropriation of the payment, the law will apply it justly, and, in case of running accounts, in extinguishment of the first debt, unless a different intention on the part of the parties may be gathered from the facts and circumstances, and such rule is not confined to payments of money, but includes payments made in commodities. p. 103.
4. **PAYMENT.—Application.—Rights of Parties.—**Where defendant entered into a written contract to deliver corn to plaintiffs, and executed his receipts for advancements, and, owing them no other debt at the time, commenced to deliver corn without attempting to collect pay therefor, it should be assumed that he intended that

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the value of such corn was to be applied to the receipts, and, when their amount in value of corn had been delivered, plaintiffs could not, in an action for money due on subsequent transactions in the account, recover attorney's fees as provided in the receipts. p. 104.

From Tippecanoe Superior Court; *Burton B. Berry*, Special Judge.

Action by the Union Elevator Company and others against Edward Born.

From a judgment for plaintiffs, the defendant appeals. *Affirmed conditionally.*

A. B. Cronk and *L. E. Ritchey*, for appellant.

Charles A. Burnett and *Wood & Evans*, for appellees.

CALDWELL, J.—Appellee Union Elevator Company brought this action against appellant, filing a complaint in six paragraphs. Answers, replies and cross-complaints were filed, under which the other appellees, Charles Haywood and John T. Detchon, became parties to the proceeding. As no question is properly presented respecting the sufficiency of any of the pleadings, we do not find it necessary to set out even their substance. A trial resulted in a finding in favor of the Union Elevator Company and against appellant in the sum of \$389 principal and interest, and \$200 as attorney fees, a total of \$589, on which judgment was rendered. The record presents but two controlling questions: First, the sufficiency of the evidence to sustain the finding; and, second, whether appellee was entitled to recover attorney fees.

There was evidence within the issues to the following effect: Prior to July 3, 1912, appellees Haywood and Detchon, as partners, under the name of Union

Elevator Company, were engaged in the business of buying and selling grain and other products at New Richmond, Montgomery county. On that day they, with others, organized a corporation, preserving and continuing such business name. This corporation, Union Elevator Company, by proper transfers and assignments, succeeded to all the rights and liabilities of the partnership, and since that day has been conducting the business.

As the corporation is the successor in interest of the partnership, in our further statement of the case, we shall refer to transactions had with either the former or the latter as had with the Union Elevator Company.

On September 1, 1910, appellant and the Union Elevator Company entered into a written contract by which the former sold and agreed to deliver to the latter, on or before February 1, 1911, 4,000 bushels of good merchantable corn, to be paid for at the market price at the time of delivery, less any advancements made. Inscribed on the contract was a receipt signed by appellant as follows:

“Received this day on above contract \$1,616.00, on which I agree to pay 7 per cent. interest until grain is delivered, without any relief whatever from valuation or appraisement laws, and attorney’s fees. Due Feb. 1, 1911.”

On September 19, September 21, October 3 and November 14, 1910, the parties entered into other contracts in terms similar to the one above outlined, by which appellant sold to the company 250, 2,000, 1,500 and 350 bushels of corn respectively, the first lot to be delivered on or before January 1, and the other three lots on or before February 1, 1911. There was

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inscribed on each of these contracts also a writing in terms as above, signed by appellant, by which he acknowledged that he had received on the involved contract \$100, \$784, \$500 and \$150 respectively. It follows that, at the close of the preliminary arrangements between the parties, appellant had sold for future delivery at market prices 8,100 bushels of corn, on which he had been advanced \$3,150. Appellant failed to deliver any corn under the contract or otherwise on or prior to February 1, 1911. Thereafter, however, he did deliver to the company large quantities of corn from time to time, aggregating much more than 8,100 bushels, and in addition delivered a large quantity of oats and other articles and products, and from time to time paid to the company money by check. The company likewise from time to time advanced to appellant large sums of money by check, and in addition sold and delivered to him stock food and other articles and products. There is no serious conflict between the parties respecting the quantity of corn and other articles and products sold and delivered, or respecting the amounts of money paid and advanced by either respective party to the other. The controversy is of the following nature: No corn having been delivered on or prior to February 1, 1911, the parties entered into a subsequent verbal agreement, respecting the terms of which the parties do not agree. Appellee offered testimony that sometime after February 1, it was agreed that appellant should proceed to deliver corn under the contracts, with the privilege of storing it for thirty days, with the right to be credited any time within the thirty days at the market price; that he did so deliver corn, and was so credited; that he delivered other corn, oats and other articles and products under

an agreement that he should be credited at the market price at the time of delivery, and that he was so credited. Appellant offered testimony that by such subsequent arrangement the written contracts were canceled, and that he delivered corn under an agreement that he should store it as long as he desired, and be credited at the market price at a time elected by him; that subsequently and after all the corn had been delivered, it was agreed that he should be credited at the rate of sixty-four cents per bushel. Under appellee's theory appellant was entitled to be credited for some of the corn at sixty-four cents per bushel, and the balance at lower rates. There is controversy between the parties, also, as to how many pounds of corn should be regarded as a bushel under the agreement made by them. Respecting this phase

1. of the case, it is sufficient to say that allowing interest, the right to which is not controverted, there was substantial evidence tending to establish that there was a balance due appellee company of \$389, as found by the court. The finding in this respect is therefore binding on this court.

We proceed to the second question: Appellee company predicates its right to recover attorney's fees on the provisions of the receipts above set out and referred to. Those receipts disclose that \$3,150 had been advanced to appellant on the corn contracts. The latter disclose that appellant obligated himself to deliver 8,100 bushels of corn. Appellee's cause of action proceeds on the theory that the money advanced with interest thereon was to be paid by the delivery of corn. Appellee's first paragraph of complaint is in part to the effect that by reason of such receipts, and the money advanced as evidence thereby, and by reason of the subsequent transactions had,

a mutual account arose between the parties, the first items in which consisted of such sums of money so advanced, and that such account disclosed a balance due appellee company for which it sued. Appellee company filed with such paragraph a bill of particulars to that effect. The remaining paragraphs of complaint declare on the receipts as unsatisfied either by payment or by the delivery of corn. Appellee offered testimony to the effect that its manner of doing business was that, when it held contracts with receipts for money advanced as above, as corn was delivered it was credited on the contracts and receipts at the market or agreed price; that as corn was delivered its value was promptly credited for the purpose of preventing interest from accumulating. The evidence disclosed that the first two contracts and receipts above mentioned had been marked "paid." All the items set out in the bill of particulars filed with the first paragraph of complaint were supported by evidence, which for the most part was uncontradicted. The first items consisted of charges against appellant in the sum of \$3,150, being the money advanced as evidenced by the receipts. There followed credits from time to time for corn delivered aggregating \$585.34, much more than enough to pay and discharge such receipts. There followed other items of credit aggregating \$1,472.13, based on oats delivered, and other items of credit based on other products sold and delivered, interspersed with charges based on money advanced and products sold and delivered to appellant. Such is the statement of the account as prepared by appellee company.

Assuming that in an action predicated on the receipts, attorney fees might be recovered as a part of

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the judgment, a point which we do not find
2. it necessary to decide, it is apparent that there could be no recovery of attorney fees as a part of a judgment based on an account. There was no agreement, verbal or in writing, that attorney fees might be so recovered. It follows that, if the receipts were paid and satisfied by the subsequent transactions between the parties, appellee was not entitled to recover attorney fees in this action.

Where a debtor owes his creditor distinct accounts or debts, and he makes a voluntary payment, he may direct its application; if he fails to do so, the

3. right passes to the creditor to apply the payment to any one or more of the debts as he pleases. If neither party makes a specific appropriation of the payment, the law will apply it according to its own notion of justice, giving effect, however, to the intent of the parties, and primarily to the intent of the debtor, if such intent may be gathered from the facts and circumstances. In the absence of an appropriation, express or implied, made by the parties, to any specific debt, the law will in running accounts make the appropriation according to the order of time in the items in the account, the first item on the debtor side being discharged by the first item on the credit side. See the following where the subject is fully considered. *Conduitt v. Ryan* (1891), 3 Ind. App. 1, 29 N. E. 160, and cases; *Tapper v. New Home, etc., Co.* (1898), 22 Ind. App. 313, 53 N. E. 202; *Barrett v. Sipp* (1911), 50 Ind. App. 304, 98 N. E. 310; *Clark v. Huey* (1895), 12 Ind. App. 224, 40 N. E. 152; *King v. Andrews* (1868), 30 Ind. 429; *Stanwix v. Leonard* (1908), 125 App. Div. 299, 109 N. Y. Supp. 804. The rule is not confined to payments made in money, but is extended to payments made in commodi-

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ties. 30 Cyc 1228; *Young v. Harris* (1880), 36 Ark. 162; *Thatcher v. Tillory* (1902), 30 Tex. Civ. App. 327, 70 S. W. 782; *Carson v. Cook County Liquor Co.* (1912), 37 Okl. 12, 130 Pac. 303, Ann. Cas. 1915B 695. It has been held that the law will apply the payment to an interest-bearing debt in preference to one bearing no interest. 30 Cyc 1242; *Rogers v. Yarnell* (1888), 51 Ark. 198, 10 S. W. 622; *Bussey v. Gant's Admr.* (1847), 10 Humph. (Tenn.) 238; *McTavish v. Carroll* (1847), 1 Md. Ch. 160; *Blanton v. Rice* (1827), 5 T. B. Mon. (Ky.) 253.

When appellant commenced to deliver corn, he owed appellee no debt other than as represented by such receipts; he made no effort to collect pay

4. for the corn as delivered. It should therefore be assumed that he intended to apply the value of such corn on the debt so represented. Appellee company actually did apply corn so delivered, and at its market value on the first two of such receipts as indicated by the fact that they were marked paid. The evidence of a custom as above outlined indicated a general purpose to that end. Moreover, appellee alleges in its first paragraph of complaint in effect that such receipts had been merged into a mutual account. In this account, as formulated by appellee, and as filed as an exhibit to the complaint, the amounts represented by such receipts appear as the first items of charges. Over against them there appear as credits successive items made up of the value of corn, oats, etc., delivered. These facts indicate that appellee thus has made application of the payments represented by the value of products delivered exactly as the law would make such application in the absence of anything to indicate the intent of the parties. We are therefore required to hold that such

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receipts had been discharged prior to the commencement of this action. It follows that appellee was not entitled to recover attorney fees as a part of the judgment. The right to recover such attorney fees is challenged by appellant's briefs.

Such being the state of the record, it is ordered that if, within thirty days, appellee Union Elevator Company shall file in this court a remittitur in the sum of \$200 to be effective as of the date of the judgment below, the judgment will be affirmed for the residue in the sum of \$389; otherwise, the judgment will be reversed, with instructions to the trial court to sustain the motion for a new trial, costs in either case to be taxed against appellee Union Elevator Company.

CALDWELL, J.—Remittitur having been filed, as suggested by the original opinion, and within the time limited, the judgment in the sum of \$389 is unconditionally affirmed; costs against appellee.

NOTE.—Reported in 118 N. E. 973. Attorneys, compensation, value of services, 16 Am. St. 592.

INDIANAPOLIS TRACTION AND TERMINAL COMPANY ET AL.
v. LEE, EXECUTRIX.

[No. 9,530. Filed March 14, 1918.]

1. TRIAL.—*Instructions.*—*Issues.*—In an action for the death of a pedestrian, where the complaint showed that decedent was struck by an automobile while lawfully upon the street and exercising due care for his own safety, an instruction that he had a right to cross the street was not erroneous or harmful, although there was no controversy over the matter. p. 110.
2. TRIAL.—*Instructions.*—*Mandatory Instructions.*—In an action against a street railroad company and the owner of an automo-

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bile truck for the death of a pedestrian, the negligence charged against defendant company being that in violation of a city ordinance it permitted the street pavement to become so worn that there were a number of holes in the same, an instruction that if the jury found that there was a hole in the street large enough for a wheel of a truck to have dropped into, "all as alleged in the complaint," and that the driver saw the hole, or could have seen it by the exercise of ordinary care, and negligently drove the machine so that a wheel dropped into it, causing the truck to veer and strike deceased, the finding should be for plaintiff, although mandatory in form and failing to specifically set out each element essential to plaintiff's recovery, such instruction was not harmful to defendants in view of the qualifying phrase, "all as alleged in the complaint," which averred facts constituting actionable negligence, and other instructions supplying the omitted essentials. p. 111.

3. **TRIAL.—Issues.—Instructions.**—Where an action for wrongful death of a pedestrian killed by an automobile was not presented or tried on the theory of the last clear chance doctrine, and there was no evidence tending to show antecedent lack of due care on the part of decedent and a subsequent chance on the part of defendant to avoid the injury notwithstanding such negligence, such theory was properly ignored in the instructions. p. 113.
4. **APPEAL.—Review.—Instructions.—Invited Error.**—Where, in an action for wrongful death, an instruction tendered by defendants was given which referred generally to the negligence of defendants by the phrase "as alleged in the complaint," defendants cannot complain of another instruction similar in form given at plaintiff's request, since error, if any, based on the general reference to the complaint, was invited. p. 114.
5. **DEATH.—Measure of Damages.**—In an action for wrongful death, an instruction that damages to the widow for the loss of her husband should be such as would compensate for the pecuniary loss sustained, taking into consideration the deceased's age, health and expectancy of life, and his earning capacity, was proper. p. 114.
6. **TRIAL.—Instructions.—Duty to Request.—Waiver of Error.**—If defendants in an action for wrongful death desired a more complete instruction on the measure of damages than that given, it was their duty to tender a correct and appropriate instruction on that subject, and, having failed to do so, they cannot complain. p. 114.
7. **APPEAL.—Review.—Evidence.—Sufficiency.**—In an action against a street railroad company and the driver and owner of an automobile truck for the wrongful death of a pedestrian, evidence

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showing that defendant company, in violation of a city ordinance requiring it to keep a portion of the street in repair, permitted the pavement to become so worn that there were a number of holes in the same, that the driver of the truck negligently drove it in such manner that one of the wheels dropped into a hole, causing the machine to suddenly leave its course and strike deceased, is sufficient to sustain a verdict for plaintiff against all of the defendants. p. 115.

From Boone Circuit Court; *Willett H. Parr*, Judge.

Action by Sybilla S. Lee, executrix of the last will of Charles H. Lee, deceased, against the Indianapolis Traction and Terminal Company and others. From a judgment for plaintiff, the defendants appeal. *Affirmed*.

D. E. Watson, A. J. Shelby and W. H. Latta, for appellants.

Charles F. Remy, James M. Berryhill, William H. Remy and Rogers & Smith, for appellee.

FELT, J.—This is a suit for damages for the death of appellee's decedent, Charles H. Lee, alleged to have been caused by the negligence of appellants. Issues were joined by general denial to the third paragraph of complaint on which the case was tried. A trial by jury resulted in a verdict for \$3,200 against appellants. Each appellant filed a separate motion for a new trial, which was overruled and an exception reserved. Judgment was rendered on the verdict. Each appellant has assigned as error the overruling of such motion for a new trial.

Omitting formal averments, the third paragraph of complaint in substance shows that the accident in controversy occurred at the crossing of Ohio and Illinois streets in the city of Indianapolis; that on and prior to November 12, 1913, ordinances of said city were in force which required the Indianapolis Trac-

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tion and Terminal Company to keep in repair that portion of the streets which lay between the tracks of said company and a space eighteen inches along and outside of the rails of its tracks; that tracks of said company on each of the streets aforesaid intersected at said crossing; that at and prior to the date aforesaid said company negligently, with full knowledge of the conditions of said street, and in violation of said ordinances permitted said streets at the crossing aforesaid to become and remain defective and out of repair at the places where it was by said ordinances required to keep the same in good repair; that said streets had been paved and the pavement at said places had been worn and removed so that holes were left three or four inches deep and below the upper surface of the tracks for a long time prior to the date aforesaid; that such holes were so large that the wheels of ordinary automobiles and trucks would drop therein when passing over the streets; that decedent, on the day aforesaid, was walking across Illinois street, in a careful and prudent manner, going east on Ohio street, about twenty-five feet north of the crossing of the car tracks on said streets; that defendant John Cheek was then and there driving an automobile truck, owned by his employer, Major K. Gleason, going north on Illinois street at the rate of eight miles per hour; that said Cheek, with full knowledge of the defective condition of said streets at said crossing, negligently drove said truck in such manner as to cause one of the wheels thereof to drop into one of said holes in the pavement; that thereupon, on account of the negligence aforesaid on the part of each of said defendants and the defective condition of said streets, said Cheek negligently lost control of said truck, and the same by reason thereof ran against

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and injured said decedent and thereby caused his death.

In the motions for a new trial appellants charge that the verdict is not sustained by sufficient evidence, and that the court erred in giving to the jury instructions Nos. 1, 5 and 6 tendered by appellee.

In the briefs, the only point presented as to the evidence is that there is much conflict and confusion in the evidence, not only between the witnesses for the plaintiff and the defendants, but between the several witnesses for the plaintiff; that on account thereof great care should be taken to determine the correctness of the instructions given; that any error in the instructions should be considered harmful to appellants and should not be treated as harmless because of other instructions given to the jury. In support of these contentions appellants cite the following cases: *Pittsburgh, etc., R. Co. v. Haislup* (1906), 39 Ind. App. 394, 396, 79 N. E. 1035; *Cleveland, etc., R. Co. v. Snow* (1905), 37 Ind. App. 646, 654, 74 N. E. 908; *Neely v. Louisville, etc., Traction Co.* (1913), 53 Ind. App. 659, 669, 102 N. E. 455; *Louisville, etc., Traction Co. v. Korbe* (1910), 175 Ind. 450, 453, 455, 93 N. E. 5, 94 N. E. 768.

Instructions Nos. 1, 5 and 6 complained of as erroneous are as follows: "1. If you find from the evidence that plaintiff's testator was, as a pedestrian, walking across Illinois street at the time and place in controversy, all as averred in the complaint, then I instruct you that said testator had a right to cross said street in the manner and place he did, if at the time he was in the exercise of ordinary care."

"5. If you find from a preponderance of the evidence that defendant Cheek was operating an automobile at a moderate gait, going north on Illinois

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street at or near the crossing of said street with Ohio street, and if you find that there was a hole or holes in said Illinois street large enough for a wheel of said truck to have dropped into said hole or holes, said hole or holes being at or near the point of junction of the curved street car rail or track, at the point in question, all as alleged in the complaint, and if you find that said Cheek saw said hole or holes, or in the exercise of reasonable ordinary care could have seen the same, and if you find that said Cheek so negligently drove said truck as to cause the wheel of said truck to drop into one of said holes, and if you find that the dropping of said wheel in said hole caused said Cheek to negligently lose control of his machine, and caused the machine to veer and hit Charles H. Lee and cause his death, all as alleged in the complaint, then you should find for plaintiff, unless you find that said Charles H. Lee was guilty of contributory negligence.'

"6. If you find from a preponderance of the evidence in this action that the plaintiff should recover against the defendants, then it will be your duty to award plaintiff such damages as will compensate said testator's widow for the pecuniary loss sustained by her as a result of his death, and in fixing the amount it will be your duty to take into consideration said testator's age at the time of his death, his health and expectancy of life, and his earning capacity, your verdict, however, not to exceed \$10,000."

Appellants assert that instruction No. 1 is erroneous and harmful because there was no issue as to the decedent's right to cross the street, and the

1. instruction was therefore confusing and misleading to the jury. The complaint shows that the decedent was struck and injured while lawfully

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upon the street and exercising due care for his own safety. Considering the issues and the evidence, the instruction was neither erroneous nor misleading. If there was no controversy as to the decedent's right to cross the street, appellants could not have been harmed in any way by the giving of the instruction. *Stringer v. Frost* (1889), 116 Ind. 477, 479, 19 N. E. 331, 2 L. R. A. 614, 9 Am. St. 875; *Simons v. Gaynor* (1883), 89 Ind. 165, 166; *Clear Creek Stone Co. v. Dearmin* (1902), 160 Ind. 162, 169, 66 N. E. 609; *Apperson v. Lazro* (1909), 44 Ind. App. 186, 191, 87 N. E. 97, 88 N. E. 99.

Appellants say that the court erred in giving instruction No. 5, *supra*, because it is mandatory and fails to "correctly state the law as to every point essential to plaintiff's right to a judgment"; that it was harmful to the traction company because it assumes that there was a hole in the pavement "large enough for a wheel of said truck to have dropped into" the same, and that the presence of such hole constituted actionable negligence on the part of the company; that the court invaded the province of the jury in determining that there was a defect in the street as would constitute negligence of the company; that under the law of the last clear chance the negligence of the driver was the sole proximate cause of the injury.

The instruction may be subject to some criticism, but it does not belong to that class of mandatory instructions which must be considered and

2. passed upon without reference to other instructions given to the jury. While mandatory in form, and failing to specifically set out each element essential to appellee's recovery, it contains the qualifying phrase, "all as alleged in the complaint."

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The complaint avers facts which constitute actionable negligence, and if proved entitle plaintiff to a recovery. The phrase aforesaid directs attention to the charge made in the complaint and necessarily to the instructions which deal with the several elements essential to a recovery and with every phase of appellants' defense.

In determining whether appellants were harmed by the giving of instruction No. 5, we may look to the other instructions, and consider all the instructions given to the jury which bear on the questions involved. *Indianapolis, etc., Traction Co. v. Wiles* (1910), 174 Ind. 236, 242, 244, 91 N. E. 161, 729; *Indiana Union Traction Co. v. Jacobs* (1906), 167 Ind. 85, 93, 78 N. E. 325; *Burford v. Dautrich* (1913), 55 Ind. App. 384, 388, 103 N. E. 953; *Shields v. State* (1897), 149 Ind. 395, 406, 49 N. E. 351; *Harmon v. Foran* (1911), 48 Ind. App. 262, 267, 94 N. E. 1050, 95 N. E. 597; *Hutchins v. State* (1898), 151 Ind. 667, 670, 52 N. E. 403; *Atkinson v. Dailey* (1886), 107 Ind. 117, 118, 7 N. E. 902; *Otter Creek Coal Co. v. Archer* (1916), 64 Ind. App. 381, 115 N. E. 952; *Knapp v. State* (1906), 168 Ind. 153, 159, 79 N. E. 1076. 11 Ann. Cas. 604. The street car company tendered twelve and the other defendant six instructions, all of which were given by the court. By these instructions appellant had the benefit at the trial of every possible proposition which limited and defined appellee's right of recovery, and likewise of every proposition available as a defense. A reading of the instructions given shows clearly that the jury were fully instructed as to every element essential to a recovery and as to the burden that rested upon appellee to prove each and all of such elements. Considering this instruction in the light of the others

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given, we are clearly convinced that in any view that may be taken of it the jury was not misled or appellants harmed by the giving of it. *American, etc., Tin Plate Co. v. Bucy* (1908), 43 Ind. App. 501, 504, 87 N. E. 1051; *Pittsburgh, etc., R. Co. v. Collins* (1906), 168 Ind. 467, 475, 80 N. E. 415; *Indianapolis, etc., Traction Co. v. Newby* (1909), 45 Ind. App. 540, 544, 90 N. E. 29, 91 N. E. 36; *Southern R. Co. v. Howerton* (1914), 182 Ind. 208, 223, 224, 105 N. E. 1025, 106 N. E. 369; *New Castle Bridge Co. v. Doty* (1906), 168 Ind. 259, 266, 267, 79 N. E. 485; *Bowers v. Starbuck* (1917), 186 Ind. 309, 116 N. E. 301; *Chicago, etc., R. Co. v. Dinius* (1913), 180 Ind. 596, 624, 103 N. E. 652; *Home Tel. Co. v. Weir* (1913), 53 Ind. App. 466, 469, 101 N. E. 1020, 1021; *Shirley Hill Coal Co. v. Moore* (1913), 181 Ind. 513, 517, 103 N. E. 802; *Neely v. Louisville, etc., Traction Co., supra*.

The suggestion which invokes the application of the last clear chance doctrine to show instruction

No. 5 to be erroneous is not tenable. The case

3. was not presented or tried on such theory.

There is neither averment nor evidence tending to show antecedent lack of due care on the part of the decedent and a subsequent chance on the part of the driver to avoid injuring him, notwithstanding such negligence, which is the basis for the application of the aforesaid doctrine. *Hartlage v. Louisville, etc., Lighting Co.* (1913), 180 Ind. 666, 668, 669, 103 N. E. 737; *Indianapolis Traction, etc., Co. v. Croly* (1913), 54 Ind. App. 566, 578, 579, 96 N. E. 973, 98 N. E. 1091.

While we do not base our opinion as to instruction No. 5 on the proposition, it is doubtful if appellant Indianapolis Traction and Terminal Company is in a position to take advantage of the objection based on

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the general reference to the complaint, for in
4. instruction No. 5 tendered by it, and given to the jury, it refers to the negligence of the defendants “as alleged in the complaint.” By this instruction, similar in form to instruction No. 5 complained of, appellant in a measure at least invited the alleged error. *Orient Ins. Co. v. Kaptur* (1911), 176 Ind. 308, 312, 95 N. E. 230.

Appellant objects to instruction No. 6 because “it would be understood by a man of average intelligence to mean to give the full earning capacity

5. of the decedent for his term of expectancy.”

The instruction is a correct general statement of the rule for the measure of damages in cases like the one at bar.

If appellants desired a more detailed statement of the elements or limitations to be considered in awarding compensation, they should have tendered

6. correct and appropriate instructions to that end, and, failing so to do, cannot be heard to complain of the instruction given. *Indiana Union Traction Co. v. Jacobs, supra; Pittsburgh, etc., R. Co. v. Brown* (1912), 178 Ind. 11, 26, 97 N. E. 145, 98 N. E. 625; *Elliot v. Elliot* (1915), 61 Ind. App. 209, 212, 111 N. E. 813; *Chicago, etc., R. Co. v. Hamerick* (1911), 50 Ind. App. 425, 448, 96 N. E. 649.

The instructions given to the jury were fair to appellants and fully as favorable to them as the law warrants. Considered together, as they should be, there is no basis for contention that they were confusing or misleading to the prejudice of appellants.

While there is conflict in the evidence as to some of the issuable facts, there is evidence tending to prove every material proposition upon which the verdict rests. The evidence tends to prove the existence of

Indianapolis Traction, etc., Co. v. Lee, Exrx.—67 Ind. App. 105.

several holes in the pavement at the crossing
7. where the accident occurred, in that portion of the street which the ordinance required the traction company to keep in repair, and that they had so existed for more than three months prior to the accident. The evidence also tends to prove that such holes were five or six inches deep, and of sufficient size and length to allow the wheels of an automobile or truck to drop to the bottom of them; that the wheels of the truck in question did drop therein, and that such fact in connection with the negligence of the driver combined to cause the truck to suddenly leave its course and strike and injure the decedent, substantially as alleged in the complaint. There was no dispute about the fact that ordinances were in force which required the street car company to keep in repair a portion of the street as alleged in the complaint. The evidence, though conflicting as to some of the facts in issue, sustains the verdict against each and all of appellants. *City of Logansport v. Smith* (1910), 47 Ind. App. 64, 73, 93 N. E. 883; *Indianapolis Traction, etc., Co. v. Springer* (1910), 47 Ind. App. 35, 43, 93 N. E. 707; *Louisville, etc., R. Co. v. Lucas* (1889), 119 Ind. 583, 591, 21 N. E. 968, 6 L. R. A. 193.

The case seems to have been fairly tried on its merits. No intervening error harmful to appellants has been shown. §700 Burns 1914, §658 R. S. 1881; *Kelso v. Cook* (1915), 184 Ind. 173, 203, 110 N. E. 987; *Shedd v. American Maize, etc., Co.* (1915), 60 Ind. App. 146, 162, 108 N. E. 610; *Bruns v. Cope* (1914), 182 Ind. 289, 296, 105 N. E. 471.

Judgment affirmed.

NOTE.—Reported in 118 N. E. 959. Death: measure of damages recoverable by wife or child for negligent killing of husband or parent, 3 Ann. Cas. 103, 16 Ann. Cas. 931, 17 L. R. A. 76, 17 C. J. 1328.

TERRE HAUTE, INDIANAPOLIS AND EASTERN TRACTION
COMPANY v. COMBS ET AL.

[No. 9,528. Filed March 14, 1918.]

1. RAILROADS.—*Interurban Railroads.—Killing Stock.—Action.—Complaint.—Sufficiency.*—In an action against a railroad company to recover for live stock killed on its right of way, a complaint showing a contract between plaintiff and defendant railroad under which the latter, in consideration of a grant of a right of way, agreed to construct and maintain two crossings and cattle guards at such points as plaintiff should designate, that defendant constructed them but neglected and refused to keep the cattle guards in repair, so that they would turn stock and prevent it from getting on the right of way, and that, without fault on the part of plaintiff, his cows, in going over one of the crossings, strayed over and across the cattle guard and were killed, states a cause of action. p. 118.
2. RAILROADS.—*Interurban Railroads.—Killing Stock.—Entry Through Gate.—Liability.*—Under §5712 Burns 1914, Acts 1903 p. 426, requiring an abutting landowner, when an interurban railroad is fenced at a point where a private way is constructed across it, to erect and maintain a gate across the way and to keep it fastened and closed when not in use by him, where an abutting owner's cattle pushed a gate in the fence open, came on the private crossing and then passed over the cattle guard, which the railroad company had contracted to maintain, onto its tracks, and were killed by its car, the railroad was not liable, unless guilty of negligence. p. 119.

From Clinton Circuit Court; *Braden Clark*, Special Judge.

Action by John E. Combs and others against the Terre Haute, Indianapolis and Eastern Traction Company. From a judgment for plaintiffs, the defendant appeals. *Reversed.*

Sheridan & Gruber and *W. H. Latta*, for appellant.
John W. Strawn and *William Robison*, for appellees.

IBACH, C. J.—This is a suit upon contract. The issues here involved were formed by a complaint in two paragraphs and answer in general denial. There was a trial by jury and verdict for appellees.

The errors assigned call in question the overruling of appellant's demurrer to the first and second paragraph of complaint, and the overruling of its motion for a new trial.

The contract which is the basis of the action was entered into by appellee John E. Combs and appellant's predecessor on January 27, 1903, which it will be observed was just before the statute (Acts 1903 p. 426, §5707 Burns *et seq.* 1914) relating to the fencing of interurban railroads was enacted, and prior to the construction of the road in question. The provisions of such contract, so far as material to this discussion, are in substance as follows: For the consideration therein named it was agreed that Combs was upon demand to execute and deliver to appellant's predecessor, its successors and assigns, a proper deed of conveyance for a right of way, and that "said traction company shall construct, keep up and maintain two crossings and cattle guards at such points as said Combs may designate for his use, also to construct, keep up and maintain a substantial American woven wire fence on either side of said right of way."

The charging part of the first paragraph is in substance that appellee Combs did execute said instrument required of him, and appellant's predecessor "entered upon and constructed said right of way, and constructed said private crossings as therein agreed, and constructed cattle guards on either side of said private crossings to keep the stock of plaintiff from straying onto its said right of way from said private

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crossings.” That appellant has wholly neglected, failed and refused to keep said cattle guards in repair so that the same would turn stock and prevent said stock from getting upon said right of way. On October 1, 1913, two cows, the property of these plaintiffs, of the value of \$150, through no fault or negligence of these plaintiffs, in passing over and across one of said driveways strayed over and across the cattle guard at said private driveway and crossing, and wandered upon the right of way and the tracks of appellant, and while upon said tracks and right of way and not upon the track or right of way at and within the limits and bounds of said private crossing and driveway a car of appellant struck and killed said two cows, to plaintiffs’ damage in the sum of \$150. The charge in the second paragraph of complaint is essentially the same. As the objections urged against the sufficiency of the first and second paragraphs are the same, they will be considered together. Such objections are in brief: That neither of said paragraphs shows how the cattle came upon the private crossing or that they were rightfully there; that it is not shown that appellant owed plaintiff any duty to protect him against injury or to maintain the cattle guards therein mentioned in such repair as to prevent cattle passing over the same from a private crossing.

As heretofore shown, each of said paragraphs shows the existence of a contract between appellee Combs and appellant’s predecessor in which it

1. is agreed as part of the consideration of the grant of the right of way that said company “shall construct, keep up and maintain two crossings and cattle guards at such points as said Combs may designate for his use”; that its predecessor did construct said private crossings and cattle guards, but

that appellant, its successor, has wholly neglected, failed and refused to keep said cattle guards in repair so that the same would turn stock and prevent said stock from getting upon the right of way; that without fault on the part of the plaintiff two cows strayed over and across one of said cattle guards and were killed by one of appellant's cars.

Each of said paragraphs states a cause of action, and therefore the court did not err in overruling the demurrers thereto. *Indianapolis, etc., Traction Co. v. Smith* (1908), 42 Ind. App. 605, 86 N. E. 498.

Under its motion for a new trial it is urged by appellant that the evidence is insufficient to sustain the verdict, and that the court erred in the giving or refusal of certain instructions.

With the exceptions herein noted, there is evidence tending to support the material averments of the complaint, but it also shows that after the

2. agreement was entered into appellee Combs placed a gate at the private crossing, which he maintained until his stock was killed, and still maintains; that on the night in question his cattle pushed the gate open and came upon the private crossing and thence passed over the cattle guard furnished by the traction company onto its right of way. The effect of such evidence presents one of the controlling questions in this appeal. In this connection it is contended by appellant that the contract did not bind the traction company to maintain cattle guards sufficient to turn stock.

At the time the contract in question was entered into there was no statute in this state requiring inter-urban railroads to fence their right of way. *Union Traction Co. v. Thompson* (1915), 61 Ind. App. 183, 111 N. E. 648. As above indicated, in March, 1903,

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a statute was enacted requiring interurban railroads, traction lines or suburban railroads using electricity for motive power to fence their rights of way used for railroad tracks, to construct barriers and cattle guards at public roads and highway crossings, maintain and keep the same in repair, and providing for the construction of farm crossings. It is expressly provided that it shall not affect or change any existing contract with reference to the building or maintenance of any fence along any such railway. *Indianapolis, etc., Traction Co. v. Smith, supra*. Section 6 of said act, *supra*, provides: "When such railroad is fenced on one or both sides at the point where such way is constructed such abutting land-owner shall erect and maintain substantial gates in the line of such fence or fences across such way, and keep the same securely fastened and closed when not in use by himself or his employees."

This particular section of said act was construed by this court in the case last cited, and it was there held under facts very similar to the present case, that the construction given §5451 Burns 1908 (relating to steam roads) should control the construction of §6 (§5712 Burns 1914), *supra*, and that an interurban railroad company is not liable for the injury or killing of animals that enter upon its tracks by passing through a gate constructed and maintained by the landowner, unless such company is guilty of negligence.

No negligence is alleged or proved in this case; therefore appellee has failed to establish the violation of any duty owing from appellant.

Without discussing the instructions separately, it is sufficient to say that the instructions given which, in effect, told the jury that appellant was liable in

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the absence of negligence were erroneous. Other instructions tendered by appellant announcing the correct rule were refused, and this was likewise error.

For the error in overruling appellant's motion for a new trial the judgment is reversed.

Judgment reversed.

NOTE.—Reported in 118 N. E. 976. Railroads: liability for injury to stock by reason of leaving gate open, 49 L. R. A. 625; duty to maintain and keep in repair fences and cattle guards, 36 L. R. A. (N. S.) 997, L. R. A. 1915B 134, 21 Am. St. 289. See under (2) 33 Cyc 1209.

EVANSVILLE, MOUNT CARMEL AND NORTHERN RAILWAY
COMPANY ET AL. v. SCOTT.

[No. 9,049. Filed December 19, 1916. Rehearing denied April 20, 1917. Transfer denied March 15, 1918.]

1. PLEADING.—*Negligence.—Allegations.—Sufficiency.*—Where the acts charged are of such a nature and character as to be necessarily negligent, they will be so regarded, although not in terms characterized as negligent. p. 130.
2. APPEAL.—*Complaint.—Sufficiency.—Theory of Case Below.*—On an appeal from a judgment for damages to land caused by the obstruction of flood waters of a river, where throughout the trial a paragraph of complaint was construed by the trial court as proceeding upon the theory that the injury resulted from the obstruction of a natural watercourse, a theory in accord with its general tenor, the sufficiency of the paragraph to resist demurrer must be tested on such theory. p. 130.
3. WATERS AND WATERCOURSES.—*Surface Water.—Obstruction.—Right of Railroads.*—Each proprietor of lands may protect himself against the flow of surface water, regardless of the effect it may have upon the lands of others, and, as this rule is applicable to railroads, they have the right to interfere with the flow of surface water in constructing and maintaining embankments upon their right of way as a part of the roadbed. p. 130.
4. WATERS AND WATERCOURSES.—*Surface Waters.—Right to Repel.*—As a general rule, on the boundaries of his own land, not

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interfering with any natural or prescriptive watercourse, the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands, and he will not be responsible for consequent injury to the lands of others, but such waters as fall in rain and snow on his land, or come thereon by surface drainage from contiguous lands, he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural watercourse. p. 130.

5. **WATERS AND WATERCOURSES.—Streams.—Characteristics.**—A stream or watercourse must have a substantial existence, but it is not essential that it flow continuously throughout the year to be classified as such, the requirement being that it must have a bed and banks and that there is evidence of a permanent stream of running water. p. 132.
6. **WATERS AND WATERCOURSES.—Streams.—Surface Water.—What Constitutes.**—Where a river overflowed by reason of heavy rainfall, as it was accustomed to do from time immemorial, and spread out over a vast area of low land adjacent to its ordinary channel, but the whole body of water moved in a current with the main channel, apparently with the same velocity and forming one continuous body of moving water, the flood waters were not surface waters, so that a railroad could not avoid liability for damages resulting from the obstruction of such water by its embankments and insufficient bridges. p. 137.
7. **WATERS AND WATERCOURSES.—Flood Waters.—Obstruction.—Negligence.—Liability.—Proximate Cause.**—In an action against a railroad company for damages resulting from the obstruction of flood waters of a stream, where the answers to interrogatories disclosed that various railroad embankments were flooded by the waters of a river, and several of them washed out, causing a rapid rise of flood water on the upper side of defendants' railroad embankment, together with an accumulation of drift against the trestle work that formed the frame for the passageway for the water, the giving way of the embankments was not the proximate cause of injury to lands damaged by water being banked up by defendants' embankment and trestle, but intervening or concurring causes, so that defendant railroads were liable, since, to hold one liable for negligence, it is not necessary that the particular consequence of his act could have been anticipated by the exercise of ordinary care, it being sufficient if the probable injurious consequence could have been anticipated by reasonable care, and not the intervening agencies contributing to the result. p. 140.
8. **WATERS AND WATERCOURSES.—Streams.—Floods.—Act of God.**—

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Where the Wabash river overflowed its banks, as it was accustomed to do each year from time immemorial, and by reason of heavy rainfall and artificial drainage emptying into the stream it reached a stage of thirty-one feet above low-water mark six miles away from the locality in litigation, whereas the highest stage previously recorded was twenty-eight feet, thirty-eight years before, the flood was not of such extraordinary character that injury to farm lands from water backed up by a railroad embankment must be regarded as caused by an "act of God." p. 141.

9. **APPEAL.—Review.—Answers to Interrogatories.—Presumptions Favoring Verdict.**—In determining the correctness of the trial court's action in overruling a motion for judgment on the jury's answers to interrogatories, notwithstanding the general verdict for plaintiff, the court on appeal will not look to the evidence actually given in the cause, but will search the pleadings to see, if from any evidence possible under the issues, the answers can be reconciled with the general verdict, and every reasonable presumption and inference deducible from the evidence which might have been admitted in support of the general verdict will be indulged in its favor. p. 141.
10. **TRIAL.—Verdict.—Scope.**—The general verdict for plaintiff is a finding in his favor upon all the issues involved. p. 142.
11. **TRIAL.—Interrogatories.—Submission.—Refusal.**—Where interrogatories material to the issues involved are requested to be given in proper form at the proper time, and are not covered by other interrogatories, it is reversible error on the part of the trial court to refuse to submit them to the jury. p. 143.
12. **APPEAL.—Review.—Harmless Error.—Exclusion of Evidence.**—Error, if any, in the exclusion of offered testimony was harmless, where the facts sought to be elicited from the witnesses were specifically found by the jury in answer to special interrogatories. p. 143.
13. **TRIAL.—Instructions.—Omissions.—Cure by Other Instructions.**—Where the trial court, in stating the issues, did not refer to the subject-matter of the affirmative paragraphs of answer, but the principles of law applicable thereto were covered by other instructions, and no burden was placed upon defendants by the instructions to establish the allegations of the affirmative paragraphs of answer, defendants got the benefit of the principles of law applicable thereto, and the failure of the trial court to refer to the subject-matter of such answers was harmless. p. 145.
14. **APPEAL.—Review.—Harmless Error.—Refusal of Instructions.**—Refusal of the trial court to give a tendered instruction to the effect that the law does not prescribe when the jury should answer the interrogatories submitted to them either before or

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after agreeing upon the general verdict, and that they could be answered according to the jury's desire, was harmless. p. 146.

15. *APPEAL.—Review.—Harmless Error.—Instructions Beyond Issues.*—In an action for damages to land caused by the obstruction of flood waters of a river, error in the instruction in reference to the subject of surface water being involved, which was beyond the issues, was harmless to defendants, where the jury was fully informed upon the question of flood waters of the main channel and the answers to interrogatories disclosed that the injury was, in fact, caused by such waters. p. 147.

16. *WATERS AND WATERCOURSES.—Flood of River.—Act of God.—What Constitutes.*—In an action for damages to land due to the obstruction of flood waters of a river, the defense that the injury resulted from an "act of God" is available only when it appears that there is an entire exclusion of human agency from the cause that produced the injury, and an occurrence that is produced partially by the intervention of human agency is not an "act of God" within the meaning of the law. p. 147.

17. *WATERS AND WATERCOURSES.—Streams.—Obstruction of Flood Waters.—Damage to Land.—Liability.*—The injury to land due to the obstruction of flood waters of a stream by a railroad embankment was not one that was taken into account in measuring damage to the owner in a condemnation proceeding when the right of way was originally acquired, and such injury does not fall within the rule of law that there can be no recovery for injuries that are incident to the due and proper exercise of the corporate franchise of a railroad. p. 150.

18. *RAILROADS.—Construction over Streams.—Duty of Railroad.*—Under §5195, cl. 5, Burns 1914, §3903 R. S. 1881, railroad companies have a right to build their roads upon or across a watercourse, but they must refrain from interfering with its free use, so that security to property is afforded, and in this behalf they must restore the stream to substantially its former state so as not to impair its usefulness more than is absolutely necessary. p. 151.

From Gibson Circuit Court; *Simon L. Vandever*, Judge.

Action by Maggie Scott against the Evansville, Mount Carmel and Northern Railway Company and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Lucius C. Embree, P. J. Kolb, Morton C. Embree,

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L. J. Hackney and Frank L. Littleton, for appellants.
Luther Benson, Henry Johnson and Byron M. Johnson, for appellee.

MORAN, P. J.—This appeal is prosecuted by appellants from a judgment against them in the sum of \$5,000 in favor of appellee for damages to her real estate, consisting of 260 acres of farming land in Gibson county, Indiana, excepting therefrom that part included in the right of way of appellants. A review of the judgment is sought by appellants on the sufficiency of the complaint, consisting of three paragraphs: to withstand a demurrer for want of facts; on the action of the court in refusing to render judgment in appellants' favor on answers to interrogatories; and in overruling appellants' motion for a new trial.

Each paragraph of complaint discloses that the appellant The Evansville, Mount Carmel and Northern Railway Company, and the appellant The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, are corporations owning a line of steam railway extending from Evansville, Indiana, to Mount Carmel, Illinois; that the Wabash river flows in a southwesterly direction and forms the western and northwestern boundary line of Gibson county, and that the country immediately east and southeast of the channel of the river for a distance of about five miles is low and level and has a fall to the west and southwest with the course and fall of the river, and to the east and southeast of the low and level country the surface of the ground rises precipitately forming a range of hills fifty to seventy-five feet high; the land of appellee is located within the low level tract of country and in time of freshets the lowlands form the

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high-water channel of the river. From time immemorial during heavy and continuous rains within the watershed of the river and its tributaries the waters in the river are swollen so that the river rises above its ordinary channel and flows in the high-water channel to a depth of from three to ten feet, having well-defined banks and beds, requiring for the free passage of such waters a much wider waterway than at other times, and at such times the waters of the river flow over upon the lands of appellee and the lands within the high-water channel; that at such times such waters form a continuous body with the waters in the ordinary channel of the river and flow with the current and as a part of the river, which occurs once or twice each year. That appellants in the year 1910 constructed their roadbed and tracks upon their right of way across the low and high-water channel in a general southeasterly and northwesterly direction, passing through appellee's lands; the roadbed and tracks are almost at right angles with the course of the high and low-water channels of the river. As a part of the roadbed four bridges were constructed in this vicinity, one over the ordinary channel, and three others, 1,500, 800 and 1,000 feet respectively in length, located one, three and a half, and five miles southeast of the ordinary channel of the river; the remainder of the roadbed across the lowlands or high-water channel was constructed of earthen embankments; the bridges and embankments were so constructed as to have a uniform grade on the top and to a height of from twelve to fifteen feet above the level of the surrounding lands; that the bridge last mentioned is located where the right of way passes through appellee's land.

The first paragraph alleges that the bridges and

embankments across the high-water channel of the river were wrongfully and unlawfully constructed and insufficient for the free passage of the water when flowing in the high-water channel, by reason of which the water would become ponded on the east side of the roadbed to a greater depth than on the west side, and thereby the water would be cast through the bridges in a concentrated volume with a swift and violent current over and upon the lands both immediately east and west of the bridges; that in March and April, 1913, the river was not sufficient to carry the waters that were cast therein, and the waters spread out over the low land, including appellee's, in a continuous body, flowing in a current of from three to ten feet deep, and but for the embankment and bridges would have naturally flowed off appellee's land without injury thereto, but by reason of the embankments and insufficiency of the bridges, wrongfully and unlawfully constructed and maintained, the waters became ponded on the right of way and stood four feet higher on the east than on the west side of the embankments, causing the water to pass through the bridge in close proximity to appellee's land with a violent current and in a concentrated volume over and upon appellee's land, thereby barren sand and gravel were washed out and deposited upon a part of appellee's land to a depth of from one to four feet; that the soil was washed off a part thereof, and appellee's land permanently injured to appellee's damages in the sum of \$10,000.

The second paragraph alleges injury to the same tract of land covered by the first paragraph and charges that the bridges and embankments were wrongfully and negligently constructed so as to impede the natural flow of the water, which caused the

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same to be cast through the bridges in a concentrated body with a swift and violent current upon the lands east and west of the bridges, and in the months of January, March and April, 1913, the main channel of the river was not sufficient to carry the water and the waters spread over the low land, including appellee's, to a depth of from three to ten feet, and but for the wrongful and negligent construction of the bridges and embankments would have passed off without injury to appellee. Hence, by reason of appellants' conduct appellee was damaged in the sum of \$10,000.

The third paragraph seeks to recover for injury to a forty-acre tract of real estate located west of the right of way, which injury it is alleged was caused by the negligent and wrongful construction of the bridge and embankment, which gave way by reason of its insufficiency in strength when the water became ponded causing the water to flow down upon and across appellee's land in a concentrated volume and violent current, washing and depositing barren sand and gravel upon her land, permanently injuring the forty-acre tract to her damage in the sum of \$3,000. Each paragraph alleges the freedom of fault on the part of appellee.

Upon the overruling of a demurrer to each paragraph of complaint, an answer of general denial was filed to the complaint and a second and third paragraph of affirmative answer was addressed to the second and third paragraphs of complaint.

Nothing further need be said at this time as to the affirmative paragraphs of answer than that the second paragraph proceeds upon the theory that the flood in the early part of the spring of 1913 was of such an overwhelming force and magnitude as to be

recognized by the law as an act of God, and that the injury for which appellee sought to recover damages was caused by this act. The theory of the third paragraph is that appellants purchased of appellee the right of way across her land before constructing their roads, and that the nature of the damages sought to be recovered is such as was compensated for by the purchase of the right of way.

The sufficiency of the first paragraph of complaint is vigorously assailed by appellants as being insufficient to withstand a demurrer for want of facts, in that the pleading discloses that the waters mentioned were surface waters, the flow of which appellants had the right to retard without becoming liable to appellee.

As we have seen, this paragraph charges that the bridge and embankment over and across what is designated as the high-water channel of the river are alleged to have been wrongfully and unlawfully constructed in that the bridges were insufficient for the free passage of the water when flowing in the high-water channel, and that the embankment obstructed and impeded the natural flow of the water through the high-water channel, and that injury resulted to appellee's real estate by reason thereof. While appellee contends that this paragraph is good on the theory of the obstruction of a natural watercourse, she also insists that it is sufficient as against the demurrer whether the water that injured her real estate be regarded as mere surface water or that of a natural watercourse, and whether appellants were shown to be negligent or not, and further that if necessary to charge negligence, in order to make the paragraph good, the facts alleged are sufficient in this par-

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ticular without the general charge of negligence. As to the latter contention, it seems to be well set-

1. tled that where the acts averred to have been done are of such a nature and character as to be necessarily negligent, they will be so regarded, although not characterized as negligent. *Blue v. Briggs* (1894), 12 Ind. App. 105, 39 N. E. 885.

Throughout the trial of the cause, and by the instructions given to the jury, this paragraph of complaint was construed by the trial court as pro-

2. ceeding upon the theory that the injury complained of resulted by reason of the obstruction of a natural watercourse. This theory seems to be in accord with the general tenor of this paragraph, and it must be tested as to its sufficiency to resist a demurrer upon this theory.

Indiana has adopted and consistently followed the common-law rule in respect to surface water, which, in general terms, is that each proprietor of

3. lands may protect himself against the flow thereof, regardless of the effect it may have upon the lands of other proprietors, and this rule being applicable to railroads, they have the right to interfere with the flow of the surface water in the constructing and maintaining of embankments upon their right of way as a part of the roadbed. *New Jersey, etc., R. Co. v. Tutt* (1906), 168 Ind. 205, 80 N. E. 420; *Clay v. Pittsburgh, etc., R. Co.* (1904), 164 Ind. 439, 73 N. E. 904; *Hill v. Cincinnati, etc., R. Co.* (1887), 109 Ind. 511, 10 N. E. 410; 40 Cyc 642, 643.

As a further elucidation of the general rule, we adopt the language employed in the case of *Cairo, etc., R. Co. v. Stevens* (1881), 73 Ind. 278, 38

4. Am. Rep. 139: "With reasonably near approximation to accuracy, it may be laid down as a

general rule, that upon the boundaries of his own land, not interfering with any natural or prescriptive watercourse, the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands; and for any consequent repulsion, turning aside or heaping up of these waters to the injury of other lands, he will not be responsible; but such waters as fall in rain and snow on his land, or come thereon by surface drainage from or over contiguous lands, he must keep within his boundaries, or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural watercourse.”

The right of appellants to ward off surface water from their right of way is well settled, so we direct our attention to the character of the water described in the paragraph of complaint under consideration as to whether it is governed by the law applicable to surface water or that of a natural watercourse.

The pleading under consideration discloses that after the main channel of the Wabash river had swollen by reason of the heavy rainfall, as it was accustomed to do from time immemorial, so that it spread out over a vast area of low land to the east, that this vast body of water moved in a current with the water in the main channel, and apparently with the same velocity forming one continuous body of moving water. Appellants take the position that this vast body of water spread out over the low lands must be classified as surface water and hence governed by the rule of law applicable thereto, and that the interference with its flow would not create liability, while on the part of appellee it is contended that it was flood waters of the river flowing in a high-water channel,

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and that under the facts pleaded it must be governed by the rule of law that governs the water of a natural watercourse, and that, governed by this rule, appellants are liable for the injury alleged to appellee's real estate.

It may be stated generally that a stream or watercourse must have a substantial existence, but it is not essential, in order for it to be classified as

5. such, that it flow continuously throughout the year. *Schlichter v. Phillipy* (1879), 67 Ind. 201.

That is, "to constitute a natural watercourse, there must be a bed and banks and evidence of a permanent stream of running water." *Weis v. City of Madison* (1881), 75 Ind. 241, 39 Am. Rep. 135; *Rice v. City of Evansville* (1886), 108 Ind. 7, 9 N. E. 139, 58 Am. Rep. 22.

There are numerous authorities to the effect that the flood waters of a stream must be regarded as surface water, and there are decisions in our own state that seem to be in accord with the holdings of other jurisdictions in this respect. *Schlichter v. Phillipy, supra*; *Jean v. Pennsylvania Co.* (1893), 9 Ind. App. 56, 36 N. E. 159; *Jack v. Lollis* (1894), 10 Ind. App. 700, 37 N. E. 728; *Taylor, Admr., v. Fickas* (1878), 64 Ind. 167, 31 Am. Rep. 114; *Cairo, etc., R. Co. v. Stevens* (1881), 73 Ind. 278, 38 Am. Rep. 139; *Weis v. City of Madison, supra*; *Benthall v. Seifert* (1881), 77 Ind. 302; *Shelbyville, etc., Turnpike Co. v. Green* (1885), 99 Ind. 205. In view of the innumerable decisions and want of harmony of the courts as to the character of water that should be regarded as surface water, and the character of water that should be regarded as of a natural watercourse or flood waters of a stream, an attempt to classify the same would lead to endless confusion.

In *New York, etc., R. Co. v. Hamlet Hay Co.* (1897), 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269, the court, passing upon the sufficiency of the complaint, which contained, among others, the following allegation: “ ‘From time immemorial, during the springtime and rainy seasons of the year, the waters in said river are swollen by rains and freshets, so that the river rises above its ordinary channel and flows in high-water channels, having well-defined beds and banks, and requires for the free passage of the water a much wider waterway than in other seasons of the year,’ ” held the railroad company liable upon the theory of obstructing a natural watercourse where injury resulted from the water that flowed in what was termed the high-water channel. The complaint in the case at bar is similar in many respects to the complaint in the Hamlet Hay Company case. Appellants regard this decision as unsound so far as it appears to be out of harmony with the foregoing decisions that treat the flood waters of a stream as falling within the rule of law governing surface water. However, in the more recent decisions of *Northern Ind. Land Co. v. Brown* (1914), 182 Ind. 438, 106 N. E. 706, and *Vandalia R. Co. v. Yeager* (1915), 60 Ind. App. 118, 110 N. E. 230, the Hamlet Hay Company case has been followed.

In the case of *Cairo, etc., R. Co. v. Brevoort* (1894), (C. C.) 62 Fed. 129, 25 L. R. A. 527, Baker J., in passing upon the question whether flood waters of a stream should or should not be regarded as surface water, held, in analyzing *Taylor, Admr., v. Fickas, supra*, the parent case in this state upon the subject, that the court was in error in assuming in that case that the flood water of the Wabash river in times of ordinary floods was surface water, and further said:

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"If the water of the Wabash river, in times of ordinary floods, is surface water, a railway company would be under no obligation to provide an outlet for its superabundant water at such times; and the ultimate result would be that all the company need do is to provide outlets sufficient to pass the water which flows in the channel, and within its banks. Such, however, is not the measure of its duty. Either the cases which hold that a railroad company, in bridging a stream, must provide a sufficient waterway for the passage of superabundant water which flows into and down the stream in times of ordinary floods, are unsound, or else the doctrine of *Taylor v. Fickas*, *supra*, and of the cases which follow it, cannot be upheld."

In *Mitchell v. Bain* (1895), 142 Ind. 604, 42 N. E. 230, which was written before the Hamlet Hay Company case, Monks, J., speaking for the court said: "A stream does not cease to be a watercourse and become mere surface water because at a certain point it spreads over low ground several rods in width and flows for a distance without a defined channel or banks before flowing again in a definite channel."

In the case of *O'Connell v. East Tenn., etc., R. Co.* (1891), 87 Ga. 246, 13 S. E. 489, 13 L. R. A. 394, 27 Am. St. 246, it was held that, in determining whether the overflow waters of a stream were to be classed with surface water depended upon the configuration of the country and the relative position of the water after it had gone beyond the usual channel, and that if the flood waters became severed from the main current, or left the stream never to return and spread out over the lower ground, it became surface water; but if it formed a continuous body with the water flowing in the ordinary channel, or if it departed from

such channel *animo revertendi*, presently to return as by recession of the waters, it should be regarded as still a part of the river, that a stream may have a flood channel to retain the surface waters until discharged by the natural flow, and further that there is no distinction in principle or authority between obstructing the flow of a stream at its ordinary level and in time of flood. This latter proposition seems to find support in numerous authorities, among which are *Burwell v. Hobson* (1855), 12 Grat. (Va.) 322, 65 Am. Dec. 247; *Crawford v. Rambo* (1886), 44 Ohio St. 279, 7 N. E. 429; *Fordham v. Northern Pacific R. Co.* (1904), 30 Mont. 421, 76 Pac. 1040, 66 L. R. A. 556, 104 Am. St. 729; *Mccomber v. Godfrey* (1871), 108 Mass. 219, 11 Am. Rep. 349.

In the latter case it was said: "But where, owing to the level character of the land, it spreads out over a wide space without any apparent banks, yet usually flows in a continuous current, and passes over the surface to the lands below, it still continues to be a water-course. *Gillett v. Johnson*, 30 Conn. 180. If the plaintiffs had erected a barrier to keep it from their land, it would evidently have accumulated, by its natural and regular flow, upon defendant's land; not merely when there were melting snows or rains, but at all ordinary seasons."

In the Hamlet Hay Company case, *supra*, the following language is used: "There is no doubt that flood water which leaves the channel of a stream and spreads out over the adjacent lands, running in different directions or settling in pools or flats, ceases to be a part of the stream and becomes in effect surface water. Such, however, was not the character of the waters here alleged to have been thrown back upon appellee's land."

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After collecting the authorities on this subject, it was held in *Vandalia R. Co. v. Yeager, supra*, that flood waters flowing without the ordinary channel under some circumstances should be classed as a part of a stream rather than surface water, and waters overflowing the natural channel flowing down the course of a stream in a uniform current with it, and at such regular intervals as to form what is known as a high-water channel, should be classed as waters of a stream rather than as in part surface water, and that under some circumstances a stream is classed as a natural watercourse in the absence of a well-defined channel as the term is usually understood, as where the water in its course spreads over a considerable breadth of land.

The authorities of this state, which appear at first blush to be out of harmony with the Hamlet Hay Company case, are not in fact so upon a close analysis, as in that case the complaint disclosed that the flood waters were connected with the water of the ordinary channel and were flowing in uniformity therewith as one current. The facts in neither of the earlier cases were similar in this respect. If all the waters referred to in the paragraph of complaint under consideration flowing to the east of the ordinary channel of the river and in uniform current therewith be regarded as purely surface water, then appellants or any other landowners within this low, level territory adjacent to the river and similarly situated could erect barriers to ward off the flowing waters from their lands and thus stop its flow, and, so long as they were successful in controlling it, the adjoining landowners, no matter how affected by the accumulation, could not complain.

In *Gould on Waters*, §264, the rule seems to be

clearly and logically stated by the author as follows: "In broken regions of country, intersected by long, deep ravines, or surrounded by high, steep hills or bluffs, down which large quantities of water from rain or melted snow rush rapidly, often attaining the volume of a small river, and usually following a well-defined channel, the common-law rule applicable to ordinary surface waters do not necessarily apply. In many respects such waters partake more of the nature of natural streams than of ordinary surface water, and, to a certain extent, are governed by the same rules; and no one has the right to obstruct or divert such waters so as to cast them upon the property of others to their injury."

Under the rule of law announced in the Hamlet Hay Company case and the authorities in harmony therewith, the first paragraph of complaint states a

6. cause of action, as against the objections urged. *Vandalia R. Co. v. Yeager, supra.*

The character of the water as collected in a body and its movement and relation to the valley were collected and main channel is characterized in the same language in the second and third paragraphs of complaint as that of the first paragraph, that is the pleader in drafting the second and third paragraphs of complaint used the exact language employed in the drafting of the first paragraph, except in the particular that the second and third paragraphs of complaint disclose that out of the negligent diversion of the flood waters of the river on the part of appellants, the real estate described in the respective paragraphs was injured. It is obvious that all of the waters mentioned in the various paragraphs of complaint consist of the flood waters of a stream, and what was said in the disposal of the error predicated upon the over-

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ruling of the demurrer to the first paragraph of complaint is applicable to that of the second and third paragraphs, each of which, when measured by the authorities cited and the facts pleaded, states a cause of action.

The interrogatories and answers thereto, which form the basis of appellants' next assignment of error, are very numerous and cover a wide field as to the facts found, among which are that the Wabash river overflows its banks from time to time, and when said river and its tributaries overflow, the waters commingle and flow with the course of the main channel of the river and at certain times of the year, and especially was this true in March, 1913, the volume of water spread out over a vast tract of low level country to the southeast of the main channel of the Wabash river for a distance of several miles to a point where there is an abrupt incline which formed the bank; that by the government gauge located at Mount Carmel, Illinois, which is about six miles north of the lands of appellee, the water reached an altitude of thirty-one feet above low-water mark, and it had not theretofore at any time reached this altitude; that the highest water known prior to March, 1913, was in August, 1875, which was twenty-eight feet above low-water mark; that the appellants' railroads cross the main channel of the Wabash river and the low, level country in which appellee's land was located diagonally to the southeast; that the roadbed was elevated several feet across this low level tract of land, being of an earthen embankment, except the part occupied by the bridges; that through the low level land and running in an easterly and westerly direction and several miles above appellants' roadbed was located the Southern Indiana Railroad

Company's railroad, with an embankment of an average height of eight feet, and about eight miles above this line of railroad was located the Chicago and Eastern Illinois Railroad Company's railroad with a similar embankment; that on March 28, 1913, the embankments of the Chicago and Eastern Illinois Railroad Company and the Southern Railway Company washed out, releasing a large volume of water that had been ponded above, which, after being released, flowed in a southwesterly direction with the course of the Wabash river, thus causing the water to rise on the upper side of the embankment of appellants' railroads at a rate of twelve inches per hour, and continued so to rise until eleven o'clock a. m., March 29, 1913, when the flood waters flowed over the embankment, and, by reason thereof, the embankment gave way in close proximity to appellee's land, which caused a part of the injury complained of by appellee; that during the afternoon of March 29, the flow of water was some ten feet deep over appellee's land, flowing in a southwesterly direction with a swift current; that over the main channel of the river was a steel bridge 1,156 feet long, and immediately east of this bridge was a pile trestle 1,066 feet long, and some distance east of this point was a second opening in the embankment built of a pile trestle 1,498 feet long, and farther to the east was a similar structure 810 feet long, and in close proximity to appellants' land was a similar opening 1,003 feet long, through which passed what is known as the Sommers ditch, and this ditch carried the waters of another stream known as Indian Camp Creek; that on the afternoon of March 29, 1913, drift collected against the trestle openings, which drift at the various trestles impeded the flow of water through the same, and on March 29

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and 30, 1913, the waters in the vicinity were more than two feet higher than they had been in August, 1875, and during the afternoon of March 29, 1913, the waters that flowed across appellee's land increased in depth ten inches per hour.

Appellants insist that the answers to interrogatories disclose that the water that was responsible for the injury complained of was surface water, and that the verdict in part at least is based upon the first paragraph of complaint, and that as to the separate motion for judgment on answers to interrogatories on the first paragraph of complaint, it should have been sustained. We need not enter upon a discussion whether a separate motion of this character is contemplated by our practice, as it is not essential to a disposition of the question.

The facts found by the answers to interrogatories, so far as they relate to the character of the water that caused the injury, substantially follow the facts set forth in the complaint, and what we have heretofore said relative to the water being classed as surface water or governed by the law that governs the water of a natural watercourse is applicable to the question presented on the motion for judgment on answers to interrogatories in this respect.

The giving way of the embankments of other railroads several miles above that of appellants, the rapid rise of the flood on the upper side of ap-

7. pellants' railroad, together with the accumulation of drift against the trestle works that formed the frame of the opening or passageway for the water, as disclosed by the answers to interrogatories, do not necessarily disclose the same to be the proximate cause of the injury, but intervening or concurring causes. It is not necessary, in order to

hold one liable for negligence, that the particular consequence could by the exercise of ordinary care have been anticipated; the particular consequence need not in fact be anticipated. It is sufficient, if the probable injurious consequence that occurred could have been anticipated by the exercise of reasonable care, and not the number of intervening agencies that might arise in the bringing about of such consequences. In other words, it is sufficient if the injurious consequence was likely to occur by reason of the condition of the place and the surroundings. *W. McMillen & Son v. Hall* (1915), 59 Ind. App. 545, 109 N. E. 424; *Cincinnati, etc., R. Co. v. Armuth* (1913), 180 Ind. 673, 103 N. E. 738.

It cannot be said from what is disclosed by the answers to interrogatories that, as a matter of law, the flood was of such extraordinary character

8. that the injury must be regarded as caused by the "act of God."

There is no such conflict between the answers to interrogatories and the general verdict as to authorize judgment being rendered in favor of appel-

9. lants thereon, especially in view of the oft-repeated rule that this court will not look to the evidence actually given in the cause, but will search the pleadings to see if from any evidence possible under the issues, such answers can be reconciled with the general verdict, and every reasonable presumption and inference deducible from the evidence which might have been admitted in support of the general verdict will be indulged in its favor. *Baker v. Baltimore, etc., R. Co.* (1915), 61 Ind. App. 454, 112 N. E. 27.

This brings us to the error predicated upon the overruling of appellants' motion for a new trial,

which in turn questions the action of the court in refusing to submit certain interrogatories tendered by appellants to be answered by the jury; in the admission and rejection of certain evidence; in giving and refusing to give certain instructions; that the verdict is not sustained by sufficient evidence, and is contrary to law.

Appellants tendered, at the proper time, 154 interrogatories, and requested the court to submit the same to the jury to be answered in the event it returned a general verdict. The court upon motion of appellee struck out eleven of the interrogatories, and in this behalf appellants contend that their rights were prejudiced thereby. The rejected interrogatories solicited answers as to where the Wabash river emptied into the Ohio river, whether the Ohio river did overflow its banks in certain seasons of the year, whether the water that moved with the channel of the Wabash river at the time of the injury was not the commingled waters of many rivers and streams that flowed into this great body of water in the vicinity of appellee's real estate, whether the flow of the water alleged to have caused the injury was not impeded by the accumulation of drift at the various waterways in the embankment of appellants' roadbed as described in the complaint, whether the breaking of the embankment caused gravel and sand to be washed upon appellee's land.

As to the interrogatories which solicited answers as to whether the water that formed this large body was not the commingled waters of many

10. streams, this fact is covered by the interrogatories that remained in the record, and which were answered by the jury. Likewise this is true as to whether or not the drift did not impede the flow of

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the water through the passageways or openings in the embankments. The general verdict found for appellee upon all the issues as well as each essential fact in the various paragraphs of complaint. *Barr v. Sumner* (1915), 183 Ind. 402, 107 N. E. 675, 109 N. E. 193; *Evansville, etc., Traction Co. v. Spiegel* (1911), 49 Ind. App. 412, 94 N. E. 718, 97 N. E. 949. And had the interrogatories, which were rejected by the court, been submitted and answered favorable to appellants, the answers would not, when considered alone, nor in connection with the answers returned to the interrogatories submitted to the jury, be sufficient upon which to render judgment notwithstanding the general verdict. In our examination of this question we have been mindful that when interrogatories material

to the issues involved are requested to be given

11. in proper form at the proper time, and are not covered by other interrogatories, it is reversible error on the part of the trial court to refuse to submit the same to the jury. *McCullough, Admr., v. Martin* (1894), 12 Ind. App. 165, 39 N. E. 905; *Helton v. Wells* (1895), 12 Ind. App. 605, 40 N. E. 430; *Clegg v. Waterbury* (1882), 88 Ind. 21; *Miller, Admr., v. White River School Tp.* (1884), 101 Ind. 503. This rule cannot be invoked in the case at bar.

As to the questions presented for consideration upon the rejection of certain evidence, it is disclosed by appellants' brief that as to three of the wit-

12. nesses in the cause, certain facts were elicited, which went to the giving way of the embankment of the Chicago and Eastern Illinois Railroad at Hazelton, Indiana, the location of the embankment, the manner of giving way, and the action of the water after it was released; the condition of the railroad embankment of the Southern Railroad Company

after the flood of 1913; and as to the difference in elevation of the waters of the Wabash valley during the flood of 1875 and that of 1913. The answers to interrogatories by the jury cover the same facts elicited from each of the witnesses respectively, and, from the nature of the interrogatories propounded, the information received was favorable to appellants, that is the jury was in possession of sufficient information so as to be able to answer the interrogatories propounded which covered this particular field of inquiry.

This court held in *City of Indianapolis v. Williams* (1914), 58 Ind. App. 447, 108 N. E. 387, that where complaint was made of the exclusion of offered testimony, and the facts sought to be elicited from the witnesses were specifically found by the jury in answer to interrogatories, the error was harmless even though the excluded evidence was otherwise competent.

A consideration of the remaining questions raised as to the admission and rejection of evidence discloses no error upon which to predicate a reversal of the judgment. It is insisted by appellants and with much earnestness that of the number of instructions given by the court of its own motion, error was committed in the giving of fifteen of the same, and that this is likewise true as to six of the instructions given at the request of appellee, and that the court erroneously refused to give thirty-four instructions as tendered by appellants. Many of the instructions given and to which objections are made announce principles of law in harmony with what was said in passing upon the sufficiency of the first paragraph of complaint to state a cause of action, upon the theory that the waters alleged to have caused the injury

should under the facts there stated be regarded as the waters of a natural watercourse, and the proof seems to make the same applicable. Many of the instructions tendered by appellants, and of which objections are made because not given, are not in harmony with the principles of law thus announced, but proceed upon the theory that the flood waters of a stream are surface water and should be so treated.

We will not incurber this opinion by reiterating what has been said in this respect, for, if correct, it answers the objections raised as to the giving and refusing to give instructions that relate to the flood water of a natural watercourse.

In stating the issues, the second and third paragraphs of answer were not referred to in any manner.

These answers are affirmative in their nature, 13. and it is urged that the failure of the court to include these answers within the purported statement of the issues brings the action of the court in this respect within the principle of law that where an instruction attempts to set out all of the essential elements necessary to a recovery and fails to do so a reversible error is committed. *Maxon v. Clark* (1899), 24 Ind. App. 620, 57 N. E. 260.

At the close of instruction No. 1 as given by the court of its own motion, and the one referred to by appellants as purporting to state the issues, is the following: "To each of the paragraphs of complaint the defendant has filed a general denial. Upon the issues thus formed the burden is placed upon the plaintiff to establish by a fair preponderance of the evidence all the material averments of at least one paragraph of her complaint substantially as alleged therein in order to recover in this action."

Preceding what is here said, the substance of the different paragraphs of complaint is set forth. So it can readily be seen that this instruction dealt only with the issues joined upon each paragraph of the complaint.

While the subject-matter of the affirmative paragraphs of answer is not referred to in the general statement of the issues, the principles of law applicable thereto are covered by the instructions No. 12 given by the court of its own motion and Nos. 8 and 14 tendered by appellee.

No burden was placed upon appellants by the instructions to establish the allegations of the paragraphs of answer under consideration; however, appellants got the benefit of the principles of law applicable thereto evidently upon the theory that the proof necessary to support the same was admissible under the general issue. The action of the court in this connection appears to be quite favorable to appellants, at least they were not harmed thereby.

Appellants' instruction No. 55 as tendered is in effect that the law does not prescribe when the jury should answer the interrogatories submitted

14. to them either before or after agreeing upon the general verdict; that the same could be answered according to the jury's desire. Complaint is made by appellants of the refusal of the court to give this instruction. The precise question here involved has recently been considered in the case of *S. W. Little Coal Co. v. O'Brien* (1916), 63 Ind. App. 504, 113 N. E. 465, 114 N. E. 96. Nothing further need be said than that the refusal of the court to so instruct the jury was harmless.

Concluding, as we have, that each paragraph of complaint deals with the flood waters of a natural

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watercourse, and that the same is governed by

15. the rules of law that are applicable thereto, there is, strictly speaking, no issue involving injury caused by the collecting of surface water in a volume or channel and unlawfully discharging the same, and what has been said in the instructions given to the jury in reference to surface water being involved is beyond the issues. When the whole context of the instructions, which refer to an issue of surface water being involved, is considered, it is plainly disclosed by the language employed in the drafting that they in fact deal with the flood waters of the river moving in a current with that of the main channel, and further, by the answers of the jury to interrogatories, it is disclosed that the waters that caused the injury were in fact the flood waters of the main channel and flowing concurrently therewith. Upon the question of flood waters and upon every other branch of the case involving the same, the jury was fully informed as to the law applicable thereto. It affirmatively appears that no harm resulted to appellants by what was said in the instructions as to the subject of surface water being involved. *Abelman v. Haehnel* (1914), 57 Ind. App. 15, 103 N. E. 869. To hold otherwise on this branch of the case would be to sacrifice merit for purely technical procedure.

This leaves for disposition the sufficiency of the evidence to sustain the verdict, and as to whether the verdict is contrary to law.

As to the injury to appellee's real estate being caused by the "act of God," or being such that the exercise of ordinary care and prudence on the

16. part of appellants in the construction of the embankment and bridges that they could not have anticipated the same as here contended, it ap-

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pears that before the "act of God" can be made available as a defense there must be an entire exclusion of human agency from the cause that produced the injury, and that an occurrence that is produced partially by the intervention of human agency is not an "act of God" within the meaning of the law. *Kirby v. Wylie* (1908), 108 Md. 501, 70 Atl. 213, 21 L. R. A. (N. S.) 129, 129 Am. St. 451; *Michaels v. New York, etc., R. Co.* (1864), 30 N. Y. 564, 86 Am. Dec. 415.

"When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect, or failure to act, the whole concurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to the acts of God." 1 C. J. 1174, and authorities cited.

The river, the flood waters of which are under consideration, is a watercourse into which many creeks, streams and small rivers flow, and thereby a vast valley is drained. By reason of the improvements that have taken place in the way of denuding the land of its timber and by artificial drainage, the water produced by rainfall and melting snow is conveyed to the main outlet with much greater velocity than when the land was covered with timber, which had a tendency to retard its flow, and especially has the flow in this respect been accelerated by artificial drainage, all of which has a tendency and does cause the streams and rivers, and especially the main waterway, to rise with much more rapidity and to a higher altitude than formerly; and the real estate of which appellee's is a part has from time immemorial been submerged by the flood waters of the river in the

rainy season of the year, and when the water reaches a certain stage it moves in a current with the waters of the main channel. All of these facts must be regarded as within the knowledge of appellants when they built their roadbed.

In *Ohio, etc., R. Co. v. Ramey* (1891), 139 Ill. 9, 28 N. E. 1087, 32 Am. St. 176, it was said: "The principle, clearly is, that although a rainfall may be more than ordinary, yet if it be such as has occasionally occurred, and, it may be, at irregular intervals, it is to be foreseen that it will occur again, and it is the duty of those changing or restraining the flow of water to provide against the consequences that will result from it. It is within the knowledge of all who have long resided in this state, that our streams are occasionally subject, after intervals which are sometimes of shorter and at other times of longer duration, to great floods, occasioned by very heavy rainfalls, and their heights are known by those who have felt interested in them. Such rainfalls were not usual and ordinary, but they were unusual and beyond ordinary,—i. e., they were extraordinary; and yet it is just as certain that like rainfalls will occur in the future as it is that the same laws of nature by which they were produced, and the same conditions to be affected by those laws, will continue to exist in the future as they have in the past." A like principle was announced in *Gulf, etc., R. Co. v. Pomeroy* (1887), 67 Tex. 498, 3 S. W. 722, to the effect that if when the road was being built extraordinary inundations had occurred within the memory of men then living, their reoccurrence should be anticipated, and provision made against the danger likely to result therefrom, should a reoccurrence of the flood take place.

In the case at bar, the facts disclose that in the year of 1875 the flood water reached an altitude of twenty-eight feet above high-water mark, while in the flood of March, 1913, it reached an altitude of thirty-one feet. This measurement seems to have been taken quite a distance above appellants' roadbed. There is evidence to the effect that the water was four feet higher on the upper side of the roadbed than on the lower side, and there is likewise evidence to the effect that appellee's real estate was injured in January preceding the March flood, and for which injury a recovery was sought in connection with the damages alleged to have occurred later; there is nothing to show that the January flood was beyond that of an ordinary flood, so upon all of the facts and circumstances, the court could not have said, as a matter of law, that the injury was caused by the "act of God," or was such that by the exercise of ordinary prudence on the part of appellants they could not have anticipated in the construction of their roadbed in the manner in which they did that an injury was not likely to occur to appellee's real estate. So these questions were properly left to the jury to determine. 2 Farnham, Water Rights §577b; *Chicago, etc., R. Co. v. Schaffer* (1887), 26 Ill. App. 280.

The injury under consideration is not one that was taken into account in measuring the compensation to the owner of the real estate when the right of

17. way was originally acquired, as it does not fall within that rule of law that there can be no recovery for injuries that are an incident to the due and proper exercise of the corporate franchise of the railroad. Gould, Waters §256; 5 Thompson, Corporations (2d ed.) §5505. To build the embankment and bridges so as to suit appellants' own best conveni-

ence, and as of proper construction from their standpoint, was not sufficient. It was said in *New York, etc., R. Co. v. Hamlet Hay Co.*, *supra*: "So far as concerns the claim made that the embankments were built in a careful manner, and so as to protect the charter rights of the appellant, we may say, as was said in the *Evansville, etc., R. R. Co. v. Dick*, 9 Ind. 433, that the embankments may have been erected in a proper manner, so far as appellant's interest is concerned, and still be constructed in such a manner as necessarily to injure appellee. In such case there can be no place for the maxim *damnum absque injuria*, and the appellee must have its right of action for damages."

This court held in *Southern R. Co. v. Weidenbrenner* (1915), 61 Ind. App. 314, 109 N. E. 926, that railroad companies become wrongdoers when they construct and maintain their bridges and embankments or trestles so as to obstruct watercourses, and that they become liable, subject to certain conditions, for injury resulting thereby, however prudently the bridges and embankments or trestles may have been constructed from their standpoint.

Railroad companies have a right to build their roads upon or across a watercourse (§5195, cl. 5, Burns 1914, §3903 R. S. 1881), but they must refrain from interfering with the free use of the same

18. so that security to property is afforded, and in this behalf they must restore the watercourse to its former state. Of course, it cannot be restored in all respects to its former condition, and the law will be satisfied if it is substantially restored as not to impair its usefulness more than the additional use for railroad purposes renders absolutely necessary. *Pittsburgh, etc., R. Co. v. Greb* (1904), 34 Ind. App. 625, 73 N. E. 620; *Evansville, etc., R. Co. v. Carvener*

Evansville, etc., R. Co. v. Scott—67 Ind. App. 121.

(1887), 113 Ind. 51, 14 N. E. 738; *Vandalia R. Co. v. Yeager*, *supra*.

The free passage of the water in the watercourse under consideration being interfered with by appellants so as not to afford security to appellee's property, as the statute provides, but on the contrary to the injury thereof, there was a direct violation of the statute, and a failure to observe a statutory duty, gives rise to a cause of action when invoked as by the first paragraph of complaint (*Evansville, etc., R. Co. v. Carvener*, *supra*; *Kelsay v. Chicago, etc., Railroad* [1907], 41 Ind. App. 128, 81 N. E. 522; *Cleveland, etc., R. Co. v. Stevens* [1911], 49 Ind. App. 647, 96 N. E. 493; *Graham v. Chicago, etc., R. Co.* [1906], 39 Ind. App. 294, 77 N. E. 57, 1055; *New York, etc., R. Co. v. Hamlet Hay Co.*, *supra*), and this issue, as well as the issue of actionable negligence joined upon the second and third paragraphs of complaint, was rightfully left to the jury under the evidence, as disclosed by the record.

Each question presented by appellants' able and exhaustive brief has received careful consideration, and we feel that there is no error in the record that calls for a reversal of the judgment. The same is therefore affirmed. Felt, C. J., Hottel, McNutt, Ibach, Caldwell, JJ., concur.

NOTE.—Reported in 114 N. E. 649. Waters and watercourses: overflow from watercourse as surface water, 3 Ann. Cas. 208; liability of railroad company for diversion of surface water to land of another, Ann. Cas. 1914A 1292, 21 L. R. A. 593, 596; liability of railroad company for interference with watercourse by construction, 19 Ann. Cas. 336; right of landowner to repel surface water, 97 Am. Dec. 565, 40 Cyc 642. See under (5) 40 Cyc 554; (6) 40 Cyc 640, 40 Cyc 583; (8) 40 Cyc 575, 1 C. J. 1174, 1178.

PAPE ET AL. v. PAPE ET AL.

[No. 9,471. Filed March 15, 1918.]

1. **INSURANCE.—Life Insurance Policy.—Construction.—Right to Proceeds.**—Where, in an application for a policy of life insurance, insured, in answer to the question, "If for the benefit of the wife, state precisely whether it shall be paid to her children, to his children, or the children of the two, if she be not living at its maturity," stated, "Their children," and the policy was made payable to insured's second wife, or if she was not living to "their children," insured's children by both marriages, on his being predeceased by the second wife, were entitled to a proportionate share in the proceeds of the policy. p. 164.
2. **INSURANCE.—Life Insurance Policy.—Contingent Interests.**—Upon the delivery and acceptance of a life policy payable to insured's second wife for her sole use if living, or if not living to "their children," a son of insured by his first wife took an interest in the policy contingent upon his and insured's surviving the primary beneficiary, which would have terminated had the son predeceased the primary beneficiary, in which event his heirs would have had no interest in the insurance. p. 168.
3. **INSURANCE.—Life Insurance.—Vested Interests.**—Where a life insurance policy contained no provision for a change of beneficiary, the primary beneficiary took a vested interest therein which terminated upon her predeceasing insured. p. 168.
4. **INSURANCE.—Life Insurance Policy.—Right to Proceeds.—Heirs of Secondary Beneficiary.—Interests.**—Under a policy of life insurance payable to insured's second wife for her sole use if living or, if not, to their children, upon the death of the second wife, insured's children who survived the second wife, including a son by insured's first wife, took vested interests in the policy, and upon such son's subsequent death his heirs succeeded to his interest, and were entitled upon the death of the insured, to their distributive shares therein. p. 169.
5. **ESTOPPEL.—Estoppel by Silence.—Diligence in Ascertaining Facts.**—Where, on insured's manufacturing company, which was managed by his son, becoming financially embarrassed, insured's brother agreed to indorse renewal notes for money owed by insured and the company on condition that policies on insured's life be assigned to him, and the son, being relied on by the brother, who could neither read nor write, to select policies which were assignable, drafted a written assignment of the policy in suit, which was not assignable and in which he had a vested

interest, facts unknown to the brother, and the latter, accepting such policy as collateral, was thereby induced to become surety on the renewal notes, and was subsequently compelled to pay the same, the son, having remained silent as to his interest, was estopped to assert any right in the policy involved as against the brother; and, in view of the brother's illiteracy and the fact that the policy was not delivered to him until four months after the assignment, he was not chargeable with lack of diligence in learning the nature of the policy assigned, as the son's failure to assert his rights amounted to affirmative conduct reasonably calculated to mislead insured's brother, so that the son should not be heard to say that the brother was not diligent because he relied thereon. p. 169.

6. **INSURANCE.—Life Insurance.—Policy.—Interest in Proceeds.—Evidence.—Sufficiency.**—In an action on a life insurance policy involving the rights of plaintiff, insured's brother, to whom the policy had been assigned in consideration of his having become surety on certain notes, and of insured's son to the proceeds of the policy, evidence showing that plaintiff who had for some years indorsed notes for insured, refused to indorse certain renewal notes, that insured thereupon suggested to his son, who managed his business affairs, and to plaintiff that certain life policies be assigned to him for security, that the son then stated the amount of assignable life policies held by insured, whereupon plaintiff, being satisfied with the suggested arrangement, signed part of the notes and the next day, after insured promised that the policies previously mentioned would be properly assigned, indorsed the remainder of the notes, and that the assignment, which was prepared by the son, included a policy in which he had an interest and which he knew could not be assigned, was sufficient to warrant the inference that plaintiff's indorsement was influenced by the son's conduct in respect to the policy, so that the son was estopped from asserting any interest in the proceeds thereof. p. 174.
7. **ESTOPPEL.—Estoppel by Conduct.**—Where insured's son prepared an assignment of life policies to insured's brother to induce him to become surety on certain notes and it was contended that the son knowingly included in the assignment an unassignable policy in which he had an interest, and that he was therefore estopped to assert any rights in such policy as against the brother, if what the son said or did in reference to the assignment was such as might have influenced a prudent man and if it did influence the result, the son was estopped to claim any interest in the proceeds of the policy, though other influences operated with his conduct. p. 174.

8. **INSURANCE.—Life Insurance.—Interest of Beneficiary.—Evidence.—Admissibility.**—Generally, where a life policy contains no provision authorizing a change of beneficiary, proof of anything said or done by the insured after the beneficiary's interest has vested is not permissible to defeat the rights of such beneficiary. p. 176.
9. **EVIDENCE.—Parol.—Beneficiary of Life Policy.—Intention.**—Where it is necessary to resort to extrinsic oral evidence to aid in arriving at who were intended as beneficiaries of a life policy by any answer in insured's application, the inquiry should be limited to evidence of intention at a date not so remote from the time of the making of the application and the writing of the insurance as to afford time and opportunity for a change of desire and purpose on the part of insured. p. 177.

From Allen Superior Court; *Carl Yape*, Judge.

Action by William Pape against the Mutual Life Insurance Company of New York, in which the company filed an interpleader making parties all living children of insured, and the several parties joined issues by way of cross-complaints and other pleadings. From the judgment rendered, Charles G. Pape and others appeal. *Affirmed*.

Harper & Fuelber and *Leonard, Rose & Zollars*, for appellants.

Martin H. Luecke, Colerick & Hogan and *Thomas & Townsend*, for appellees.

HOTTEL, J.—The questions presented in this appeal had their origin in a suit on an insurance policy. The undisputed facts developed at the trial in the court below, pertinent and necessary to an understanding of said questions are in substance as follows:

The life insured by the policy involved was that of Carl Pape, hereinafter referred to as "C." He was twice married, and had children by each wife. By his first wife, Wilhelmina, he had five children, whose names and the dates of whose births are respectively as follows: Elizabeth (Pape) Isreal, born in 1859;

William Pape, born in 1862; Henry Pape, born in 1867; Emily Pape, born in 1870, and Sophia (Pape) Buuck, born in 1872. All these children, except William, are named as appellees. Wilhelmina died December 16, 1872, and C married his second wife, Caroline, June 16, 1873. By this marriage children were born as follows: Charles G. Pape, July 16, 1875; Minnie Pape, July 5, 1877; Albert O. Pape, November 7, 1880; Edward Pape, July 25, 1884; Walter Pape, March 9, 1887, and Edna Helen (Pape) Shober, August 17, 1890. Said Minnie died in infancy on April 13, 1882. The others are appellants. Said William Pape died on September 24, 1908, leaving as his only heirs at law, his widow, Caroline Pape, and five children, viz., Roy Pape, Estella Pape, Carl Pape, Clarence Pape, all of whom, except Roy, were minors when this action was commenced.

On September 22, 1879, C made a written application to the Mutual Life Insurance Company of New York for a policy of insurance upon his life. Upon this application the policy herein involved was issued September 26, 1879. C had a brother William to whom he assigned said policy in the year 1909. C and his second wife lived together as husband and wife until her death on April 27, 1908. C died April 25, 1911, survived by all his children above named except Minnie and William.

On May 2, 1912, William Pape, C's brother, filed his complaint in the trial court against the Mutual Life Insurance Company of New York, alleging therein the issuing of said policy, and the assignment thereof to him, and that he was entitled to the proceeds thereof, and making said policy and assignment parts of said complaint by way of exhibit. Said company appeared in court to said complaint and filed

an interpleader, in which it admitted the execution, delivery and validity of the policy, making parties thereto all the living children of said C by both marriages, and asking that they be substituted as defendants in its place, and that it be permitted to pay the proceeds of the policy into court and be discharged from further liability thereon. This petition was allowed, and pursuant thereto said company paid into court the sum of \$3,049, and was discharged from further liability. On July 11, 1913, said company was granted leave to amend their interpleader by making parties defendant the heirs of said William Pape, the deceased son of C, viz., Caroline Pape, his widow, and Roy, Estella, Carl, Clarence and Gladys Pape, his children. Said persons appeared, and upon the suggestion that Estella, Carl, Clarence and Gladys were minors, Harry G. Hogan was appointed their guardian *ad litem*. Said heirs and said guardian are appellees herein.

These various parties, by way of cross-complaints and other pleadings, joined issues upon their conflicting claims in the proceeds of said policy. The court, upon request of appellants, made a special finding of facts, and stated conclusions of law. These findings and conclusions were in favor of appellees, and judgment was rendered accordingly. A joint motion for new trial filed by all the appellants, and a separate motion filed by Charles G. Pape were each overruled.

The errors assigned and relied on for reversal are as follows: (1) The court erred in overruling appellants' demurrer to the cross-complaint of appellees Elizabeth Israel et al.; (2) the court erred in overruling appellants' demurrer to the cross-complaint of appellees Caroline Pape et al.; (3) the court erred in overruling appellants' demurrer to the cross-com-

plaint of Caroline Pape, Roy Pape, and the minor heirs of William Pape by their guardian Harry G. Hogan; (5), (6), (7), (8) the court erred in its first, second, third and fourth conclusions of law, respectively; (9) the court erred in each of its conclusions of law; (10) the court erred in overruling appellants' motion for a new trial. Appellant Charles G. Pape assigns in addition the overruling of his motion for a new trial.

The determination of the questions sought to be raised by appellants under their first, second and third assignments, *supra*, depends upon the construction of the policy of insurance here involved, and, inasmuch as appellants concede in their brief that the same questions "will be raised by not only the sufficiency of the evidence but the special findings," we will pass to a consideration of the other assigned errors relied on for reversal.

It will be necessary to an understanding of these questions that we set out the substance of the material facts found by the court. In addition to the general undisputed facts above indicated, the special finding sets out said application of C for insurance and the policy issued thereon, the parts of which pertinent and necessary to an understanding of said questions are as follows:

The application:

"3. A. State the amount of insurance applied for. * * * D. If for the benefit of the wife, state precisely whether it shall be paid to her children, to his children, or to the children of the two, if she be not living at its maturity. * * * A. 3000. * * * D. Their children. * * *."

The policy:

“The Mutual Life Insurance Company of New York * * * in consideration of the application for this policy and of the several statements made therein, promises to pay * * * unto Caroline Pape, wife of Carl Pape * * * for her sole use, if living, in conformity with the statute, and if not living to their children, or their guardian for their use, Three Thousand Dollars * * *.”

Other facts found specially by the court pertinent to said questions are as follows: C was for a number of years engaged in the manufacturing business in Ft. Wayne, Indiana, and operated a corporation known as the Fort Wayne Wind Mill Company, all the stock of which C had purchased and held up to the time when, in 1909, he made an assignment for the benefit of his creditors. He was the sole owner of said business and had full management thereof for a number of years prior to said assignment. During said period he had borrowed extensively from banks in Ft. Wayne and towns in the vicinity thereof, to secure which loans he had given his notes and notes of said corporation, among which were notes, aggregating in amount about \$24,000, indorsed by the appellee William Pape, his brother. Said indebtedness had been carried for a number of years, and the notes had been from time to time renewed as required by the banks. On March 1, 1909, said C was financially embarrassed, and contemplated making an assignment of all his property for the benefit of his creditors. Said William knew this, and before said assignment was made was insisting upon the assignment to him of certain policies, including the one in suit. C continued to operate said

corporation up to about the first of June, 1909, at which time he retired from business, and so remained until his death. On or about September 28, 1909, C conveyed all his said property to a trustee for the benefit of his creditors. For two years prior to said conveyance, appellant Charles G. Pape, C's son, was employed by C as bookkeeper and manager of said company, and as such had access to C's private papers and was familiar therewith. In the latter part of 1908 and 1909, said Charles G. Pape informed said William that he, William, was surety on about \$12,000 worth of notes for said corporation. About said time said William found that he was in fact on paper for C, and for said company, to the extent of about \$20,000. William thereupon refused to renew said notes, unless he would be secured by collateral, whereupon it was proposed by C that he assign to William his policies of life insurance. When C attempted to assign said policies he was informed by his son, Charles G., that he could not assign all his policies, that one had been assigned to him, Charles G., and that C had only three left which could be assigned. Whereupon Charles G. produced three policies and wrote out an assignment, in which said three policies were mentioned, which assignment C and William signed, and was as follows:

“Fort Wayne, Ind., March 1, 1909.”

“This is to acknowledge the transfer *as collateral* only the following policies—to Wm. Pape, Sr.

Metropolitan Life Ins. Co.	2500.00
No. 201890	
The Mutual Life Ins. Co.	3000.00
No. 205043	

John Hancock Mutual 2500.00
Life Ins. Co. No. 75642

“If obligations are liquidated policies are to
revert back to Chas. Pape.

C. Pape.”

C made the foregoing assignment on March 1, 1909, and from said date said William paid the premiums on all of said policies, and upon the policy in suit amounting to \$154.29, until the death of said Carl. Said assignment was in the handwriting of said Charles G. Pape. C and said William were unable to read or write in English.

Thereafter, on July 7, 1909, C executed the following assignment, pursuant to the provisions of said policy, viz.,

“Form of Assignment:

“For one dollar, * * * and * * * other valuable considerations * * * I hereby assign, transfér and set over to William Pape * * * all my right, title and interest in this policy, No. 205043, issued by The Mutual Insurance Company of New York and for the consideration above expressed I do also for myself, my creditors and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above named assignee, his executors, * * * and their title to said property well forever to warrant and defend.

“Dated * * * this 7th day of July 1909.

“C. Pape.”

In consideration of the assignment of these policies said William became surety on the renewal notes

and became and continued to be obligated in the sum of about \$24,000. Said policies were not delivered to said William until after the said July 7, 1909. At the time of said assignment of March 1, 1909, said William was, and now is, unable to read or write English. He never examined said policies nor had them examined to determine whether they were assignable, but relied on Charles G. Pape to select such policies as were assignable, for the purpose of securing said William as surety on said notes.

Said Charles well knew at the time of the assignment so written by him that said policy was not assignable and well knew that said William could not read or write English, and that William and C relied on him, Charles, to select the policies that were assignable, and William, relying upon the conduct of Charles, and induced by his conduct as to this policy, before set out, became surety upon the renewals of said notes for said C and said mill company to the extent above referred to, and he did so believing that C had the right to assign the same, and having no notice or knowledge that Charles G. had or claimed any right in said policy.

By reason of becoming surety on said notes, William has been compelled to pay for said C and for said company, \$8,953.31, and is now obligated to pay between \$10,000 and \$12,000, and there are no assets of the estates of said C or said company from which he can be reimbursed.

The conclusions of law stated by the court are, in substance, as follows: (1) That said William Pape has an interest in said policy to the amount of the premiums advanced by him on said policy, viz., \$154.29; and said William has, in addition thereto,

the interest of the defendant Charles G. Pape, the same being one-tenth of said \$3,049, and one-tenth of the accrued interest thereon. (2) That said Charles Pape is estopped by his conduct to claim any interest in said policy, and should have and recover nothing herein, and judgment should be against him for costs on his cross-complaint. (3) That Albert O. Pape, Edward A. Pape, Walter O. Pape, Edna Helen Shober, Louise Isreal, Henry Pape, Emilie Pape and Sophia Buuck are entitled to and should receive each one-tenth; that the children of William Pape, deceased, the son of the assured, to wit, Estella Pape, Roy Pape, Carl Pape, Clarence Pape and Gladys Pape, are entitled to and should receive each one-fiftieth of the proceeds of said policy of insurance and the accrued interest thereon in the hands of * * * trustee; that the said * * * trustee be ordered and directed to pay said money and the interest; to Edward A. Pape, one-tenth; to Walter O. Pape, one-tenth; to Edna Helen Shober, one-tenth; to Louise Isreal, one-tenth; to Henry Pape, one-tenth; to Emilie Pape, one-tenth; to Sophia Buuck, one-tenth; to Edward A. Pape, one-tenth; to Walter O. Pape, one-fiftieth; to Carl Pape, one-fiftieth; to Clarence Pape, one-fiftieth; and to Gladys Pape, one-fiftieth. (4) That the plaintiff William Pape and the defendants Louise Isreal, Henry Pape, Emilie Pape, Sophia Buuck, and the heirs of William Pape, deceased, to wit, Estella Pape, Roy Pape, Carl Pape, Clarence Pape and Gladys Pape, are entitled to a judgment for costs against the defendants Charles G. Pape, Albert O. Pape, Walter Pape, Edward A. Pape and Edna Helen Shober.

The correctness of each of these conclusions of law is challenged by appellants.

It is contended that the court erred in its third and fourth conclusion of law and in each thereof

because the application and policy set out in

1. the finding of facts show that the only persons entitled to participate in the proceeds of the policy are the five children of C by his second marriage. This contention is based on appellants' construction of the words "their children" in the policy.

In the case of *Lehman v. Lehman* (1906), 215 Pa. St. 344, 64 Atl. 598, a widower with six children married a widow with one child and had by her two children. After this marriage he took out a policy of insurance upon his life, whereby the insurer promised to pay the amount of the policy to his wife, "in trust for herself and their children, in equal shares." The question arose whether his children by the first marriage were entitled to participate in the insurance. The Supreme Court of Pennsylvania affirmed a judgment in favor of said children, upon an opinion in which it was said, on pages 348, 349, 350 and 351: "There is nothing in the context to aid the appellant's construction of the words 'their children' in the beneficiary clause of the insurance policy. Nor are any circumstances shown which it may be inferred would have been likely to influence the insured to prefer one set of his children over the other. The suggestion that naturally he would be concerned especially for the children of his second wife because they were younger would not be without force if there were any evidence that at the time he took the policy the children by his first wife were not dependent members of his household, they were adults or that

all of them had reached an age when it might be presumed they were self-supporting or soon would become so. But the record contains no evidence of that kind and there is no ground for surmise even, that there was such a difference between the ages of his youngest children by his first wife and the age of his oldest child by his second wife as would naturally incline him to discriminate in favor of the latter. There is also a total absence of evidence that at the time the policy was issued the children of his first wife owned any property in their own right or that the insured had made or had the ability to make any other provision for them; * * * In short, there is nothing in the context, or in the circumstances under which the policy was taken, or in the subsequent conduct of the insured to aid the appellant's contention that the insured intended to exclude his children by his first wife. It must be sustained, if at all, because that is the absolute meaning of the words used in the beneficiary clause. But the words 'their children' may be used in one connection to designate the children having a common parentage on both sides and in another connection to designate the children of the husband and the children of the wife spoken of. Neither law nor common usage has affixed such unvarying meaning to the word 'their' as to prevent its appropriate use for the latter purpose. In determining the sense in which they were used in a contract or in a will regard must be had to the subject-matter. * * * Here the insured, in making a provision to take effect upon his death for those dependent upon him, used words, which without violence to the sense in which they are commonly used, may be construed to include all those coming equally

within the reason of the provision, and there is nothing in the context or in the extraneous circumstances from which the intention to exclude any may be safely inferred. He must have known that his words were susceptible of this construction, and therefore it may be safely assumed that if he had intended to restrict the benefits of his provision to his children by his second wife he would have been careful not to choose words that were easily susceptible of a broader construction."

We think that these remarks are applicable to the case at bar. It can hardly be contended that the words "their children" have any such fixed meaning that they could not be construed to mean the children of the husband and the children of the wife, rather than the children having a common parentage only, nor do the facts found by the court necessitate such a construction. From the findings it appears that when the insured applied for the policy in suit his oldest child by his first marriage was a female about twenty years of age, and his youngest child by that marriage was about seven years old and that he then had two children by his second marriage who were respectively two and four years old. It is not likely, in view of their ages, that he would have preferred the children of the second over those of his first marriage.

But appellants urge that the answer to question "3.D." in the application set out in the finding of facts, *supra*, show that the insured intended that, should his wife predecease him, only his children by her should participate in the insurance.

It is insisted by appellants that if C had desired the children of both his marriages to participate in the insurance, he would have adopted that form of

answer indicated in the question "3. D.," *supra*, by the words "his children." But if he could aptly have designated all his children by both marriages by the phrase "his children," so, too, under the circumstances, could he aptly have designated the children of the last marriage by the phrase "her children." Had the insured used the phrase contained in said question, "the children of the two," appellants' contention would present a more serious question. The fact that he did not use this phraseology where it was desired to make the children of the common parentage only the beneficiaries, but used instead the more comprehensive words "their children," is in our judgment significant. We think it reasonable to assume that his refusal or failure to adopt such answer in all probability resulted from the fact that he understood the phrase "the children of the two" to mean only those having a common parentage, and that by the phrase "their children" he intended to designate all his said children as distinguished from those of the second marriage only. As before stated, had he intended to provide first for his wife, and then, in the event of her predeceasing him, for her children, he could have done so by using the first phrase suggested by the very question that he was answering, viz., "her children." Instead, he used words reasonably susceptible of a construction broad enough to include all his children of both marriages, and the comparative ages of the two sets of children being such as to bring both sets equally within the reason for the provision of insurance, and no reason appearing why he should make any distinction between the children of the two wives, it may be safely assumed that had he intended to restrict said provision to his children by the second marriage, he would not, under the cir-

cumstances, have used words so easily susceptible of a broader construction. See, also, *Stigler's Exrs. v. Stigler* (1883), 77 Va. 163; *State Life Ins. Co. v. Redman* (1901), 91 Mo. App. 49; also an unreported New York case discussed in Bliss, *Life Ins.* (2d ed.) §345.

It is contended, however, that said conclusions of law are erroneous even if said children of said first marriage are entitled to participate in the insurance, in that said conclusions would allow the heirs of said William Pape, the deceased son of C, to participate therein, to the extent of the interest which said William would have had, if he had survived the insured. Apparently, this question has never been decided in this state.

The findings show that C's son William survived his mother, Caroline Pape, the primary beneficiary, and predeceased C, the insured. Upon the de-

2. livery and acceptance of the policy, said William took an interest therein contingent upon both his and C's surviving Caroline. This contingent interest of William would have terminated had he predeceased Caroline, the primary beneficiary, in which case his heirs would have had no interest in the insurance. *Burnett v. Mutual Life Ins. Co.* (1917), 66 Ind. App. 280, 114 N. E. 232, 235.

The policy in suit contained no provision for a change of beneficiary. Caroline therefore took a vested interest therein, which terminated upon

3. her predeceasing C. *Burnett v. Mutual Life Ins. Co., supra; Indiana, etc., Ins. Co. v. McGinnis* (1913), 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192.

Upon Caroline's death, the children of C who sur-

vived her, including said William Pape, took vested interests in said policy, and upon William's

4. subsequent death, his heirs succeeded to his interest, and were entitled, upon the death of the insured, to their distributive shares therein. *Harley, Admr., v. Heist* (1882), 86 Ind. 196, 44 Am. Rep. 285; *Lerch v. Freutel* (1901), 36 Misc. Rep. 581, 73 N. Y. Supp. 1078; *Walsh v. Mutual Life Ins. Co.* (1892), 133 N. Y. 408, 31 N. E. 228, 28 Am. St. 651; *U. S. Trust Co. v. Mutual, etc., Ins. Co.* (1889), 115 N. Y. 152, 21 N. E. 1025; *Millard v. Brayton* (1901), 177 Mass. 533, 59 N. E. 436, 52 L. R. A. 117, 83 Am. St. 294; *Michigan, etc., Ins. Co. v. Basler* (1905), 140 Mich. 233, 103 N. W. 596; *Smith v. Aetna Life Ins. Co.* (1895), 68 N. H. 405, 44 Atl. 531; *Mutual Life Ins. Co. v. Spohn* (1916), 170 Ky. 721, 186 S. W. 633.

For the reasons indicated, we think that the conclusions of law are not open to the objections indicated.

Appellants say that the first and second conclusions of law, that Charles G. Pape should be estopped to claim any interest in said policy of insurance,

5. are erroneous because there are no findings that Charles G. Pape's conduct contained any of the elements of fraud. We think that this contention is based on an erroneous conception of the nature of the estoppel sought to be asserted. The findings show that Charles G. Pape was the manager of said Fort Wayne Wind Mill Company, and that said William Pape was willing to indorse the renewal notes of C and of said company upon the condition that the policies of insurance upon the life of said C be assigned to him; that William was ignorant of the fact that the policy in suit was not assignable, and that C's son Charles had any rights therein; that William relied on Charles to select policies that were

assignable; that Charles knew these facts and knew his rights in said policy, and so knowing produced this and two other policies as policies that could be assigned, and drafted a written assignment thereof, and, without disclosing to William the fact that said policy was not assignable, and that he (Charles) had rights therein, permitted William to accept the assignment of the same in consideration of his indorsing said notes; that William was induced by said conduct of Charles to become surety upon said notes, and by reason thereof had been compelled to pay \$8,953.31, and was obligated to pay in addition \$10,000 or more.

Because Charles was silent as to his rights in said policy when the assignment was made, he should now be estopped to assert those rights. In the case of *Kiefer v. Klinsick* (1896), 144 Ind. 46, 54, 55, 42 N. E. 447, 450, it is said: "He, who by his language or conduct, leads another to do what he would not otherwise have done, will not be permitted to subject such person to loss or injury by disappointing the expectations upon which he acted. A change of position by the first party would involve both fraud and falsehood, and the law abhors both. The principles of *estoppel in pais* have been applied to a great variety of cases. The doctrine has no application where everything is equally known to both parties, or where the party sought to be estopped was ignorant of the facts out of which his rights sprung or where the other party was not influenced by the acts asserted in estoppel. But if one stand by and see another purchase property without disclosing his interest to the person about to purchase, he cannot afterward set up a claim of which the purchaser had no notice. Nor is it nec-

essary that the person sought to be estopped be present at the time the sale is consummated. If he have knowledge of the contemplated sale and of the fact that the purchaser is ignorant of his rights it is his *duty* to disclose his interest to such purchaser. Nor is it necessary that there should exist a design to deceive or defraud on the part of the person sought to be estopped. It is enough if when he asserts his claim it would be inequitable and unjust to allow it to prevail against the purchaser. The falsehood and moral wrong which the law denominates fraud appears when the claim is asserted. And this is true whether a party knowingly remains silent or so negligently conducts himself with reference to his rights as to mislead another. *Duckwall v. Kisner*, 136 Ind. 99; *Anderson v. Hubble*, 93 Ind. 570; *Fletcher v. Holmes*, 25 Ind. 458; *Gatling v. Rodman*, 6 Ind. 289." (Italics inserted.)

The findings in the case at bar show that Charles G. Pape did more than merely "stand by" and fail to assert his rights in said policy. They show that he produced said policy as one which could be assigned, and wrote the memorandum of assignment. By this conduct he helped to create the situation which placed upon him the duty to assert his rights.

Appellants say that there is no finding of a misrepresentation of existing facts by said Charles, but merely an expression of opinion as to his rights, which does not create an estoppel. *McGirr v. Sell* (1877), 60 Ind. 249; *Ross v. Banta* (1895), 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; *Mitchell v. Fisher* (1884), 94 Ind. 108. In answer to this, it may be said that the findings do not show that said Charles expressed any opinion whatever, or that he made any

positive representations concerning the policy, but, as before indicated, they do show that he was cognizant of and assisted in the consummation of the transfer and assignment of a policy of insurance in which he now asserts an interest; that he knew that such assignment and transfer was being made by his father, the assignor, to induce his father's brother to sign as surety the father's notes; that he then knew that he had an interest in said policy, and that such policy was not assignable and that his father and uncle could not read or write English, and that they trusted and relied on him "to select such policies on the life of his father as were assignable" and to inform them of the nature of said policies.

Appellant Charles, under the circumstances indicated, having remained silent as to his known interest in said policy, at the time of said assignment, to permit him now to assert and obtain an interest in said policy against the claim of his uncle would operate as a fraud on the uncle, which the law will not permit.

Appellants say also that William Pape was not diligent in learning the nature of the policy assigned to him. In cases of estoppel by silence it has been held that the person relying on the silence must not have had the means of knowing the true state of facts, as, e. g., by reference to the public records, and it has been said that in this respect such estoppel differs from the class of estoppels resulting from affirmative acts or conduct. 10 R. C. L. 694, and note 15. The whole course of Charles' conduct, as shown by the findings—his producing said policy as one that could be assigned, his writing the assignment thereof, and his failure to assert his rights

therein—was more than mere passive silence. It was affirmative conduct, reasonably calculated to mislead William Pape, and he (Charles) should not now be heard to say that William was not diligent because he relied thereon. The findings further show that William was not able to read or write in English and that the policy was not delivered to him until more than four months after the assignment took place. Under such circumstances it cannot be said that he was not diligent.

By the first three grounds of their motion for a new trial, appellants challenge the decision of the court as not sustained by sufficient evidence, and as being contrary to law. The proposition advanced in support of these contentions are the same as those advanced in support of the contention that the conclusions of law are erroneous, viz., the absence of certain of the elements of fraud.

William Pape, the plaintiff, testified substantially as follows: He had been for years indorsing his brother C's notes; Charles G. Pape would at times bring such notes to him for renewal; about March 1, 1909, he called at C's house; at that time there were due some of C's notes, which William said he would not sign. C then mentioned some policies of insurance and said to his son, the appellant Charles G. Pape: "I got \$25,000.00 life insurance and let us sign some over so he is secured, so he wont lose anything." Charles G. Pape replied: "Pa, you have only \$10,000.00 and \$2,000.00 you can't sign away." C then said that he would assign to William \$8,000 in insurance policies, which William replied was satisfactory. William then commenced to sign the notes. The next day William with his son, a man of mature

years, went to C's house and asked C if the policies would be assigned to him. C said "Yes." William "commenced signing notes again." The policies were not then delivered to him, but he signed the notes because C promised to assign the policies to him.

Charles G. Pape testified as follows: At the request of C, his father, he sometimes took renewal notes to William Pape for his signature. Most of these notes were in said Charles' handwriting. In December, 1908, his father requested him to come to his home. Upon arrival there, C said: "Bill here is insisting on having all the insurance assigned to him." On March 1, 1909, C telephoned to witness and asked him to bring the policies to his father's house. There C asked him to write the memorandum of assignment above set out, which he did, and he handed it and the policies to his father.

William Pape, Jr., a son of plaintiff, testified that after the death of Carl Pape, Charles G. Pape came to see him about the policy in suit, in which he claimed an interest, and then said to witness that he knew at the time this policy "was signed over that we couldn't get the money."

While this evidence is by no means conclusive, we cannot say that it will not permit the inferences which authorize the finding of the trial court. From

6. it the trial court may have, and in fact did, conclude that William's indorsement of the notes was influenced by Charles' conduct in re-
7. spect to said policy. If what he did or said was such as might have influenced the conduct of a prudent man and if it did influence the result, that is enough, though other influences operated with it. Bigelow, Estoppel (6th ed.); *McAleer v. Horsey*

(1871), 35 Md. 439; *Boles v. Birmingham Bennington* (1896), 136 Mo. 522, 38 S. W. 306.

Appellants claim that the court erred in sustaining the objections to certain questions propounded to Albert O. Pape. The questions and testimony offered in response thereto are as follows: "Q. I will ask you * * * to state to the court whether or not prior to your father's death, he gave or conveyed real estate to the children of the first marriage?" Upon objection to this question, appellants offered to prove in explanation of "the position and intention of the parties herein as supplemental to the policy as well as the application and as further to assist the court in arriving at the intention of the parties to the contract, that the decedent, Carl Pape, before his death, conveyed a large quantity of real estate to each of the children of the first marriage." "Q. I will ask you to state to the court * * * if you know from your own knowledge whether your father, before his death, did convey property consisting of real estate to each of the children of the first marriage, of the value in the neighborhood of 12 or \$15,000.00?" The appellants offered "to prove in answer to this question that * * * Carl Pape before his death, conveyed to the children of the first marriage, real estate of the value of 12 to \$15,000.00." "Q. I will ask you * * * to state to the court whether or not at that time you had a conversation with your father about why he was conveying real estate to his first children and not to his second, and whether or not you had any conversation about insurance, if so, what did he say with reference to that?" The appellants offered to prove in answer to this question "that these conveyances were made

by the * * * insured to the parties hereto, as children of the first marriage; that he asked his father why he was conveying property to those children and not to his second children, to which the father replied, that he had taken out several policies of insurance among which was the policy in question, in suit, which would be paid to the children of the second marriage at the time of his death; that he had not provided for the first children, therefore he thought it nothing more than right that they should receive some of the property so as to equalize the matter.”

It will be observed that the first and second questions, *supra*, inquire whether at some indefinite time before C's death he gave or conveyed real estate to the children of his first marriage. The contract of insurance was made in 1879. C died in 1911. If the gift or conveyance of the real estate had been made contemporaneously with or before the application, such fact might throw some light on the proper construction of the beneficiary clause of the policy and the answer to question “3.D.” of the application, (*Lehman v. Lehman, supra*), but the fact that such gifts were made long after the receipt of the policy would not necessarily show C's intention, when the contract of insurance was made, as to the beneficiaries intended therein. It is a general rule that in policies

like that here involved, which contain no pro-

8. vision authorizing a change of beneficiary, proof of anything said or done by the insured after the interest of the beneficiary has vested is not permissible to defeat the rights of such beneficiary. *Masons', etc., Ins. Assn. v. Brockman* (1897), 20 Ind. App. 206, 50 N. E. 493; *John Hancock, etc., Ins. Co. v.*

Daly (1878), 65 Ind. 6; note 11 L. R. A. (N. S.) 92 *et seq.*; note 49 L. R. A. (N. S.) 853 *et seq.*

We recognize that in the instant case the purpose of the offered evidence was to throw light on the question of who was really intended by the

9. insured as his beneficiary, and that in this respect it might be distinguished from those cases in which the rule *supra* is recognized. However, we can see no good reason why the rule should be different. It seems to us safe and wholesome to hold that where it is necessary or proper to resort to extrinsic oral evidence to aid in arriving at who were meant and intended as beneficiaries by any answer in the application of the insured, the inquiry should be limited to evidence which can be said to throw light on the meaning intended and understood by the insured at the time his application and insurance was written. At least, evidence of intention at a date so remote from such time as to afford time and opportunity for a change of desire and purpose on the part of the insured would open the door in such cases to the violation of the general rule indicated *supra*.

The third question, *supra*, was properly excluded for the reason indicated in our discussion of the evidence offered in answer to the first and second questions *supra*.

Finding no reversible error in the record, the judgment below is affirmed.

NOTE.—Reported in 119 N. E. 11. Insurance: meaning of term "children" as used to designate beneficiaries in life policy, 15 Ann. Cas. 529, Ann. Cas. 1913A 300; vested interest of beneficiary in ordinary life policy, 1 Ann. Cas. 684, 11 Ann. Cas. 49, Ann. Cas. 1912B 1144, 19 Am. St. 786, 790. See under (1) 25 Cyc 888 (2-4) 25 Cyc 890, 891; (5-6) 16 Cyc 759; (8) 16 Cyc 734; (9) 25 Cyc 963,

HASKELL AND BARKER CAR COMPANY v. BROWN ET AL.

[No. 9,760. Filed November 2, 1917. Rehearing denied March 15, 1918.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeal.—Assignment of Error.—Sufficiency.*—On an appeal from an award of compensation by the Industrial Board, an assignment of error that the award is not sustained by sufficient evidence is proper, and it challenges the sufficiency of the evidence to sustain every issuable fact essential to the sustaining of the award. p. 181.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Proceedings for Compensation.—Burden of Proof.*—Under the Workmen's Compensation Act, Acts 1915 p. 392, the burden is on the applicant for compensation for the death of her husband to prove by a preponderance of the evidence facts showing not only that she is a dependent of deceased, but also that he received an injury resulting in his death and that the injury arose out of and in the course of his employment. p. 182.
3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeal.—Evidence.—Sufficiency.*—An award of compensation will not be disturbed on appeal if there is evidence to support each element essential to a recovery. p. 183.
4. MASTER AND SERVANT.—*Workmen's Compensation Act.—Proceedings for Award.—Burden of Proof.*—Although the burden is on the applicant for workmen's compensation to prove each element essential to a recovery this rule is met by any evidence, however slight, which is sufficient to make a reasonable man conclude in applicant's favor. p. 183.
5. MASTER AND SERVANT.—*Workmen's Compensation Acts.—Powers of Industrial Board.—Appeal.—Review.—Findings.—Inferences.*—The Industrial Board may, like a court or jury, draw reasonable inferences from the facts and circumstances in evidence, and where it does so, the court on appeal cannot say that the fact found as a result of such inferences is not supported by sufficient evidence, although such facts and circumstances are of a nature that reasonable men might draw opposite inferences. p. 184.
6. MASTER AND SERVANT.—*Workmen's Compensation Act.—Appeal.—Sufficiency of Evidence.—Scope of Review.*—In determining whether the evidence is sufficient to sustain an award, the court on appeal can consider only that evidence most favorable to appellee. p. 184.
7. MASTER AND SERVANT.—*Workmen's Compensation Act.—Con-*

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- struction.—Accident.*—The word "accident" in the Workmen's Compensation Act, Acts 1915 p. 392, is used in its popular sense, and means any unlooked for mishap or untoward event not expected or designed. p. 187.
8. *MASTER AND SERVANT.—Workmen's Compensation Act.—Accident.—Evidence.—Sufficiency.*—In a proceeding under the Workmen's Compensation Act, Acts 1915 p. 392, for compensation for the death of a servant, evidence showing, in substance, that decedent was employed in unloading heavy steel sheets, which work required a great deal of physical effort when it was necessary to separate sheets which at times became jammed together, that decedent became ill shortly after assisting in prying two of the sheets apart, and that the attending physician found deceased suffering from acute aneurism or bulging of the wall of a blood vessel, which is frequently caused by the strain incident to heavy lifting, is sufficient to sustain the conclusion of the Industrial Board that decedent's injury and consequent death, was the result of an accident. p. 187.
9. *MASTER AND SERVANT.—Workmen's Compensation Acts.—Construction.—Accident in Course of Employment.*—The words "by accident growing out of and in the course of the employment," as used in workmen's compensation acts, should be given a broad and liberal construction in order that the humane purpose of such acts may be realized. p. 188.
10. *MASTER AND SERVANT.—Workmen's Compensation Act.—Injuries in Course of Employment.*—In a proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, for compensation for the death of a servant, where the undisputed evidence showed conclusively that decedent at the time of his injury was performing part of his duties at a time and place required by such duties, his accident occurred in the course of his employment. p. 189.
11. *MASTER AND SERVANT.—Workmen's Compensation Act.—Proceedings for Compensation.—Evidence.—Sufficiency.*—In a proceedings before the Industrial Board for compensation, the admission of hearsay evidence, even though error, would not entitle appellant to a reversal of an award for applicant, where the evidence aside from the hearsay testimony, was sufficient to sustain the award. pp. 190, 191.

From the Industrial Board.

Proceedings for compensation under the Workmen's Compensation Act by Ida Brown and another against the Haskell and Barker Car Company. From

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an award for applicant, the defendant appeals. *Affirmed.*

Bernard Korbly, Williad New, Cornelius R. Collins and Jeremiah Collins, for appellant.

Joseph W. Hutchinson, for appellee.

HOTTEL, C. J.—This is an appeal from an award of the Industrial Board of Indiana, by the terms of which appellee Ida Brown, as wife of Michael Brown, deceased, was awarded 300 weeks' compensation against the appellant, at the rate of \$6.87 per week, \$100 burial expenses, and the reasonable expense of the physician who attended deceased during the period of the illness which resulted in his death.

The errors assigned and relied on for reversal are as follows:

“First. The Industrial Board erred in its rulings of law upon which the award is based, in this: (a) The Industrial Board erred in finding that decedent was personally injured by *accident*; and (b) The Industrial Board erred in finding that decedent suffered personal injuries by accident ‘*arising out of and in the course of the employment.*’ Second. The Industrial Board erred in its rulings of law in considering the hearsay evidence of each of the three witnesses, Frank R. Warren, Ida Brown and Etta Brown, upon which the award in this cause is based. Third. The award of the Industrial Board of Indiana is not sustained by sufficient evidence. Fourth. The award of the Industrial Board of Indiana is contrary to law.”

It is contended by appellees that no question is presented by the first assigned error. Assuming that

they are right in this contention, it avails them

1. nothing, because they in effect concede, and correctly so, that the questions attempted to be presented by rulings (a) and (b) respectively under said first assigned error are in fact presented by the third assigned error. In view of the fact that a motion for new trial is not provided or contemplated by the act in question, we think the third assigned error is proper under the original act, and that when assigned in this court it challenges the sufficiency of the evidence to sustain every issuable fact essential to the sustaining of the award of said board. It may be remarked in this connection that the legislature in 1917, by an amendment of §61 of the original act, authorizes an assignment of errors to the effect that the award of the full board is contrary to law, and providing that such an assignment challenges "the sufficiency of the facts found to sustain the award, and the sufficiency of the evidence to sustain the finding of facts."

"The burden of proving the essential facts necessary to establish a case warranting the payment of compensation rests upon the dependent * * * as much as it does upon a plaintiff in any proceeding at law. * * * The elements that need to be proved are quite different from those in the ordinary action at law or suit in equity, but, so far as those elements are essential, they must be proved by the same degree of probative evidence." *Sponatski's Case* (1915), 220 Mass. 526, 527, 108 N. E. 466, L. R. A. 1916A 333; *Woods v. T. Wilson, etc., Co.* (Ct. of App.) 6 B. W. C. C. 750, 765; *Sanderson's Case* (1916), 224 Mass. 558, 113 N. E. 355.

It follows that, under our statute, the burden was

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on appellee to prove by a preponderance of the evidence facts showing not only that she is a

2. dependent of deceased, but also (1) that deceased received an injury resulting in his death; (2) that such injury arose out of his employment with appellant; and (3) that it was received in the course of such employment. *Union Sanitary Mfg. Co. v. Davis* (1916), 64 Ind. App. 227, 115 N. E. 676; *King's Case* (1915), 220 Mass. 290, 107 N. E. 959; *McCoy v. Michigan Screw Co.* (1914), 180 Mich. 454, 147 N. W. 572, L. R. A. 1916A 323; *Sponatski's Case, supra*; *Reimers v. Proctor Pub. Co.* (1914), 85 N. J. Law 441, 89 Atl. 931; *Chicago, etc., R. Co. v. Industrial Board* (1916), 274 Ill. 336, 113 N. E. 629; *Sanderson's Case, supra*.

Appellant insists that as to each of these elements essential to recovery the evidence was insufficient to sustain the finding of the board, and cites the following cases: *Voelz v. Industrial Commission* (1915), 161 Wis. 240, 152 N. W. 830; *Doherty's Case* (1915), 222 Mass. 98, 109 N. E. 887; *Perry v. Ocean Coal Co., Ltd.* (1912), 5 B. W. C. C. 421; *Perry v. Baker* (1901), 3 W. C. C. (Eng.) 29; *Kerr v. Ritchies* (1913), 6 B. W. C. C. 419; *Beaumont v. Underground Elec. R. Co.* (1912), 5 B. W. C. C. 247; *Southall v. Cheshire County News Co., Ltd.* (1912), 5 B. W. C. C. 251; *Hawkins v. Powell's, etc., Coal Co.* (1911), 4 B. W. C. C. 178; *Steers v. Dunnewald* (1914), 85 N. J. Law 449, 89 Atl. 1007; *Sanderson's Case, supra*; *O'Hara v. Hayes* (1910), 3 B. W. C. C. 586; *Farmer v. Stafford, Allen & Sons, Ltd.* (1911), 4 B. W. C. C. 223; *Spence v. W. Baird & Co., Ltd.* (1912), 5 B. W. C. C. 542; *Powers v. Smith* (1910), 3 B. W. C. C. 470; *Barnabas v. Ber-sham Colliery Co.* (1910), 4 B. W. C. C. 119; *Sav-*

age's Case (1915), 222 Mass. 205, 110 N. E. 283; *Chicago, etc., R. Co. v. Industrial Board, supra*.

No good purpose could be served by an attempt to distinguish the facts in each of these cases respectively from those presented by the record in the instant case, but we deem it sufficient to say generally that those cases in which the court of appeal holds against the dependent, are cases in which it clearly appears either that there was a total failure as to one or more of the essential elements of recovery above indicated, or otherwise the finding below was against the dependent, and hence the court of appeal very properly held that they could not weigh the evidence, and hence could not disturb the finding below. The seven cases last cited *supra* are of the character last mentioned, and some of them very properly emphasize the fact that the finding below was against the dependent and that for such reason the judgment below could not be disturbed, and that a reverse finding of such board would for the same reason be likewise sustained. These cases would be controlling in the instant case if the finding of the Industrial Board had been in appellant's favor. The finding in the instant case is for the dependent, and if each

3. of the elements indicated have any evidence for their support, the award cannot be disturbed by this court. The rule quoted *supra* from *Sponatski's case* does not mean that the dependent must demonstrate his case, but it is no more than an expression in different language of the well-recognized rule applicable generally in all proceedings at law, viz., that if, as to any fact essential to
4. recovery the plaintiff offers no evidence in his favor upon which a reasonable man can act,

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he must fail. It is true, as appellant in effect contends, that as to said essential elements of recovery the dependent must have some evidence from which the rational mind is relieved from that uncertainty which results merely from speculation or fancy. This demand, however, is met by any evidence, though slight, which is "sufficient to make a reasonable man conclude in his favor" as to such essential facts. *Sponatski's Case, supra*, and cases cited on page 528.

And such board, like a court or jury, may draw reasonable inferences from the facts and circumstances in evidence, and where it draws such infer-

5. ences from facts and circumstances which in their nature are such that reasonable men might draw either the same or opposite inferences, this court cannot say that the fact found as a result of such inference is not sustained by sufficient evidence. *Western Union Tel. Co. v. Louisville, etc., R. Co.* (1915), 183 Ind. 258, 263, 108 N. E. 951, Ann. Cas. 1917B 705; *Gish v. St. Joseph Loan, etc., Co.* (1918), 66 Ind. App. 500, 113 N. E. 394, 396; *Interstate Iron, etc., Co. v. Szot* (1916), 64 Ind. App. 173, 115 N. E. 599.

In determining the question whether the evidence is sufficient to sustain said award, that evidence alone most favorable to appellee must be considered.

6. *Southern Product Co. v. Franklin Coil Hoop Co.* (1914), 183 Ind. 123, 106 N. E. 872.

The evidence pertinent to the facts challenged, *supra*, as not being proved, is in brief to the following effect: On the day of his injury, decedent was in appellant's employ engaged in unloading steel sheets from a car. Two of these sheets when riveted together would make the end of a box car. Each sheet weighed from 465 to 485 pounds, and was moved by

means of a derrick or crane operated by a locomotive. The attachment of the crane to the sheets was by means of a chain and hook, the latter being inserted in a rivet hole in the top edge of the sheet. Decedent and another man worked on the car and made the attachment of the hook to the sheet, and of the chain to the hook, it being a part of decedent's duty to guide the chain as the chain descended. The sheets stood on edge in the car and sometimes became jammed together, and their separation required a great deal of physical effort. This work at times required heavy lifting, straining, effort, and the doing of it required a man of good physical strength. "If there are any weaklings they do not stay around the work very long." *On the morning of his injury, decedent came to his work feeling well.* The man who was working at decedent's side at the time of his injury testified to the following effect, viz.: "*I saw Brown when he let go of the hooks, I saw him put his hand to his throat and noticed that there was something wrong with him, I did not know what. I noticed him go like he was staggering 'and in a choking disposition.'*" *I worked with him since December 23 (The time of the accident was April 5.) doing the same kind of work and never noticed him have any attack before. All of a sudden after he had apparently been fixing the hooks or lifting, or doing something that I did not see, he staggered and got out of the car."*

The witness Ziesmer testified in effect that *decedent steered the chain and gave the signal to lift, that just the minute he got the hook in and gave the signal to pull the chain a little he said something had happened to him and grabbed for his throat—said he was*

sick. This was about thirty minutes after they had broken into this car. They had to pry to get the first two sheets apart. They were flattened together "and we had to raise them out to get those hooks into the hole so we could raise them up. We had a crowbar and he was on one end and I was on the other. We made about one pry."

Shortly after this injury, decedent went home and went to bed and Dr. Warren was called. He testified specifically to the condition in which he found decedent, that he was suffering from aneurism—a bulging of the wall of the blood vessel. "You have a weakening there first, but that alone would not be aneurism. After it swells it is aneurism. *In this case it was a sudden dilation from the artery that I found.*" There must have been degenerative changes in the structure of the blood vessel wall which would weaken it. It is not conceivable that the blood vessel would give way without the predisposing cause. "I did not make an examination to see what that was, but *the symptoms were incontrovertible. The aneurism was already there when I was called. From the history of the case, from what they told me coming on at that time, my opinion was that the strain was undoubtedly the exciting cause.*" If he had been lifting, the dilation would have been more during the process of strain, because during the strain the blood pressure is increased. It is often the case that if he followed lifting, did it daily, the dilation would grow until it became more weakened, and the time would come when some small act would cause a dilation. "I don't know what the condition would have been in the particular case, but it does often happen that way." People suffer from trouble of this sort and live to be

old. Where you have a predisposing condition it is also a fact that strains cause troubles of the kind from which Brown suffered. There are people living with this predisposing condition, who if they do not have some exciting cause may live to be quite old and die of something else. *"It would be the reasonable theory that Brown's condition was aggravated from some action on his part immediately preceding the time I was called to see him. I do not believe that aneurism would develop to the size found in this case if there was no exciting cause."* Without any exciting cause, it would come up gradually and slow. They usually do come gradually, but this was sudden and acute so it must have been due to an exciting cause. When they come suddenly there must have been some increase of blood pressure or some strain to bring it that way all of a sudden.

The word "accident" in the act in question is used in its popular sense, and means "any unlooked for mishap or untoward event not expected or de-

7. signed." *Fenton v. Thorley & Co., Ltd.* (1903), App. Cas. 443; *Boody v. K. & C. Mfg. Co.* (1914), 77 N. H. 208, 213, 90 Atl. 859; *Bryant, Admx., v. Fissell* (1913), 84 N. J. Law 72, 86 Atl. 458; *United Paperboard Co. v. Lewis* (1917), 65 Ind. App. 356, 117 N. E. 276, and cases there cited.

The conclusion of the Industrial Board to the effect that decedent's injury and consequent death was the result of accident is at least justified,

8. if not forced, by said evidence and the cases cited.

In considering the question whether an accident arose both out of and in the course of an employment, the Supreme Court of New Jersey, in the case

of *Bryant, Admx., v. Fissell, supra*, pages 76 and 77, said: "For an accident to arise out of and in the course of employment, it must result from a risk reasonably incidental to the employment. As was said by Mr. Lord Justice Buckley in *Fitzgerald v. Clarke & Son* (1908), 2 K. B. 796. 'The words "out of" point, I think, to the origin and cause of the accident; the words "in the course of" to the time, place and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words "out of" involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment.'

"We conclude, therefore, that an accident arises 'in the course of the employment' if it occurs while the employe is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time." See, *United Paperboard Co. v. Lewis, supra*, and cases there cited.

This court has given its approval to the holding which obtains generally in other jurisdictions that the words "by accident growing out of and in

9. the course of," should be given a broad and liberal construction in order that the humane purpose of the act of which they form a part should be realized. *United Paperboard Co. v. Lewis, supra; Holland, etc., Sugar Co. v. Shraluka* (1917), 64 Ind. App. 545, 116 N. E. 330.

This court in the case first cited also said that an accident is said to arise "out of" the employment "when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the work was required to be performed and the resulting injury." See also cases there cited.

The undisputed evidence in this case shows conclusively that decedent at the time of the accident and injury was doing that which, under his employ-

10. ment, he might do as a part of his duties at a time and place required by such duties, and hence that, under the law, as indicated in the cases cited *supra*, his accident occurred "in the course of his employment."

The only question concerning which there seems to be any room for doubt in the instant case is whether the accident arose out of the decedent's employment, and, in our judgment, the seriousness of this question is practically eliminated by the rule of law, above stated, which prevents this court from weighing the evidence and compels it to affirm the award of the Industrial Board unless it can say that such board had no evidence, either direct or circumstantial, which could be said to furnish any ground upon which a reasonable mind might predicate the inference drawn by said board as to the existence of such fact. We deem it unnecessary to further extend this opinion by a repetition of the evidence which, we think, supports and authorizes the inferences drawn by the board. We have italicized portions of the evidence which we think at least tend to support such inferences, and which serve to distinguish the facts of the instant case from the facts of those cited and relied

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on by appellant. As tending to support our conclusion, see also, *Fowler v. Risedorph Bottling Co.* (1916), 161 N. Y. Supp. 535; *McArdle v. Swanson Harbour Trust* (1915), 8 B. W. C. C. 489, 11 N. C. C. A. 175; *Fisher's Case* (1915), 220 Mass. 581; *Doughton v. Hickman, Ltd.* (1913), 6 B. W. C. C. 77.

Appellant further urges that reversible error is presented by his second assigned error. Appellee meets this contention with the claim that no

11. objection was made, or exception taken, to the admission of such hearsay evidence before the member of the board before whom the original hearing was had, that appellant elicited, or at least, invited, the admission of such evidence, and that, in any event, such evidence is made proper by a rule promulgated by the Industrial Board. It is also contended that under the act in question, and the decided cases construing similar acts, hearsay evidence may be heard by such board, and that its admission furnishes no ground for reversal. Other questions of practice and procedure are suggested by the parties, as presented by the record, which they insist are pertinent to their several contentions. The conclusion which we have reached makes it unnecessary to discuss or determine these several questions, further than to say generally that the decided cases recognize that the Industrial Board is essentially an administrative body rather than a court, and that, in the admission of evidence such a body should not be held to the same strict rules as are applicable to courts, that the admission of incompetent evidence by such board will not operate to reverse its award where there is any competent evidence to support it. *United Paperboard Co. v. Lewis, supra; First Nat.*

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Bank v. Industrial Commission (1915), 161 Wis. 526, 528, 529, 154 N. W. 847.

Appellant, in his reply brief, in effect concedes the rule to be as we have stated, but insists that without the hearsay evidence there is no evidence to sustain the board's award. In our statement of the evidence, *supra*, we have omitted any reference to the evidence complained of by appellant in its brief as hearsay, except an opinion of the attending physician based on the history of the case as it was given to him. This physician was offered by appellant and while his opinion elicited on cross-examination was based on facts communicated to him by the decedent, such facts were substantially in accord with those above indicated as testified to by other witnesses. So that independent of the hearsay evidence there is sufficient evidence to prevent a reversal of the award of said board on the ground of its being insufficient to sustain said award.

It follows that under the rule indicated the admission of such evidence would in no event entitle appellant to a reversal of the award of the board.

The award of said board is therefore affirmed.

NOTE.—Reported in 117 N. E. 555. Workmen's compensation: what constitutes injuries arising out of and in the course of employment within meaning of act, L. R. A. 1916A 40, 232, 1917D 114; Ann. Cas. 1913C 4, 1914B 498, 1916B 1293, 1918B 768; C. J. Workmen's Comp. Acts 64.

Retmier v. Cruse—67 Ind. App. 192.

RETMIER ET AL. v. CRUSE.

[No. 10,179. Filed March 19, 1918.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.*—*Appeal.—Assignment of Error.—Questions Presented.*—On an appeal from an award by the Industrial Board, an assignment of error that the award is contrary to law is sufficient to present both the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts. p. 194.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.*—*Finding of Industrial Board.—Conclusion of Law.*—A finding by the Industrial Board that an employe received a personal injury by an accident arising out of and in the course of his employment is a legal conclusion and not a finding of an ultimate fact. p. 194.
3. MASTER AND SERVANT.—*Workmen's Compensation Act.*—*Finding of Facts.—Sufficiency.*—An award of the Industrial Board for an employe's death showing the fact of employment, that the employe died from a certain injury, and that prior to death the employer paid workmen's compensation for such injury, was sufficient, although not specifically stated that the injury occurred in the course of the employment. p. 196.
4. MASTER AND SERVANT.—*Workmen's Compensation Act.*—*Award of Compensation.—Evidence.—Sufficiency.*—In a proceeding for an award under the Workmen's Compensation Act, Acts 1915 p. 392, evidence showing that an employe's injury resulted in nephritis, which lowered his power to resist a disease to which he was predisposed and which caused his death earlier than it would otherwise have occurred, was sufficient to sustain an award to the employe's dependents. p. 197.

From the Industrial Board.

Proceedings for compensation under the Workmen's Compensation Act by Sarah J. Cruse against Frank C. Retmier and another. From an award for applicant, the defendants appeal. *Affirmed.*

Charles E. Henderson and James L. Murray, for appellants.

Carson, Lehman & Faust, for appellee.

FELT, J.—This is an appeal from an award made for appellee by the Industrial Board of Indiana. The finding of facts and the award are as follows: “Be it remembered that pursuant to notice fixing the time and place therefor, this cause was called for review at the office of the Industrial Board in the State House, before the full board, on the 27th day of September, 1917, at three o’clock, p. m. The plaintiff appeared by Joseph O. Carson and Wm. H. Faust, her attorneys, and the defendants appeared by J. M. Murray, their attorney. And the full board, having heard the argument of counsel, having reviewed the evidence, and being fully advised in the premises, by a majority of its members, finds that on the 8th day of September, 1915, one Paul Cruse was in the employment of defendant, Frank Retmier, at an average weekly wage of \$20.00; that on said date the New Amsterdam Casualty Company was the compensation insurance carrier of the defendant employer; that on the said 8th day of September, 1915, the said Paul Cruse received a personal injury by an accident arising out of and in the course of his employment, as a result of which he died on the 8th day of July, 1917; that as a result of said injury and on account of the disability resulting therefrom, the defendant employer paid to the said Paul Cruse, during his lifetime and after his injury, fifty-eight weeks’ compensation at the rate of \$11.00 per week; that the said Paul Cruse left surviving him as his sole and only dependent and next of kin, the plaintiff, his mother, who at the time of his injury and death was wholly dependent upon him for support; that the defendant employer had actual knowledge of the injury of the said Paul Cruse at the time that it occurred, and also

had actual knowledge of his death immediately after it occurred.

“Award. It is therefore considered and ordered, by a majority of the members, that the plaintiff be and is hereby awarded against the defendants, two hundred and forty-two weeks’ compensation at the rate of \$11.00 per week. It is further ordered that the defendants pay the burial expenses of the said Paul Cruse not exceeding one hundred dollars. It is further ordered that the defendants pay the costs of this action.

“Dated this 17 day of October, 1917.

“Industrial Board of Indiana, By

“(Signed) Edgar A. Perkins

“(Signed) Charles R. Hughes.

Members.”

The error assigned and relied on for reversal is that the award of the Industrial Board is contrary to law. The assignment is “sufficient to present

1. both the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts.”

We consider first the sufficiency of the finding of facts to sustain the award.

The statement that “Paul Cruse received personal injury by an accident arising out of and in the course of his employment” is a legal conclusion and

2. not an ultimate fact. *Inland Steel Co. v. Lambert* (1917), 66 Ind. App. 246, 118 N. E. 162; *Lagler v. Roch* (1914), 57 Ind. App. 79, 85, 104 N. E. 111.

It has also been held that it is proper for the Industrial Board to include in a finding its general conclusions which may be reviewed on appeal, but are not

binding on the court unless the same are supported by the ultimate facts included in the finding of the board, and that conclusions of law cannot be considered in determining whether under the ultimate facts found the injury or death was the result of an accident. *Inland Steel Co. v. Lambert, supra.*

An agreement to pay compensation during the lifetime of an injured employe, or the payment of compensation to him, has been held to amount to an admission that there had been an accident, for which the employer was liable to pay compensation, but that such agreement or payment is not an admission that the death of such employe was caused by an accident rendering his employer liable to his dependents for compensation. §37 Workmen's Compensation Act, Acts 1915 p. 392; *Cleverley v. Gas, etc., Co.* (1907), 1 B. W. C. C. 82, 84, 24 T. L. R. 93; *Perry v. Woodward Bowling Alley Co.* (1917), 196 Mich. 742, 163 N. W. 52; L. R. A. 1916A 133, 134.

In *Perry v. Woodward Bowling Alley Co., supra*, the Supreme Court of Michigan said: "The record does disclose that the deceased sustained an injury, and during his disability received compensation; but it is further incumbent upon the claimant to show, by competent evidence from which fair inference could be drawn, that his death resulted from the injury. This the claimant has failed to do, and compensation for the death must therefore be denied."

In *Cleverley v. Gas, etc., Co., supra*, the English Court of Appeals, in speaking of the death of an employe with whom his employers had made an agreement and paid compensation thereunder during the lifetime of the employe, said: "But the agreement only amounted to an admission that there had been

an accident, and that the company was liable to pay compensation for the same. It was not an admission that the death was caused by the accident."

We have in the finding in this case the ultimate facts of decedent's employment; that he received a personal injury on September 8, 1915; that he died from such injury on July 8, 1917, and the fur-

3. ther finding "that as a result of his said injury and on account of the disability resulting therefrom, the defendant employer paid to said Paul Cruse, during his lifetime, and after his injury," certain compensation.

Following the decisions aforesaid, the above statement includes all the facts essential to appellee's right to compensation. It amounts to a finding that said injury resulted from an accident, for which appellant was liable, which necessarily includes the facts that such accident occurred while decedent was engaged in doing the work he was employed to do and that the injury resulted as a natural incident of such employment. *McNicol's Case* (1913), 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A 306; *In re Harra-den* (1917), 66 Ind. App. 298, 118 N. E. 142.

Considering the foregoing in connection with the ultimate facts of relationship and dependency the finding of facts is sufficient to sustain the award in appellee's favor. But it is earnestly contended by appellant that there is no evidence to support the finding that the death of decedent resulted from the alleged accidental injury.

The record shows that on September 27, 1915, Paul Cruse and appellant entered into an agreement showing a weekly wage of \$20 and authorizing a weekly compensation of \$11 to be paid by appellant on ac-

count of the injury to Cruse; that such agreement was filed with and approved by the Industrial Board of Indiana; that compensation was paid in pursuance of such agreement until December 30, 1915, when payment was stopped; that Cruse duly requested an adjustment of his claim for further compensation; that an attorney representing appellant's insurance carrier made an investigation of the case, and as a result thereof, on January 8, 1917, entered into an agreement with Cruse, before the Industrial Board, in which it was stipulated that the employee was entitled to compensation and that there was then due him payments in arrears aggregating \$385; that the employee's weekly payments would continue "until such time as he was able to resume his ordinary duties, or until payments made fully complied with the Workmen's Compensation Law; that said amount was paid and weekly payments continued to June 18, 1917, when payment was discontinued."

The evidence tends to show that while Cruse was working for appellant, in pursuance of his employment, he received a severe injury to the lower part of his back as the result of an accidental fall, which disabled him at that time for a period of nineteen days, and that he was then paid compensation for five days; that soon thereafter he tried to work at his trade as a carpenter but was unable to continue because of the effects of his injury; that about a month subsequently to his injury Cruse went to Chicago to visit and rest, and remained there for more than a month; that subsequently he went to Albany where he worked for a news company as a caller until May 10, 1916, when he became severely ill and returned home, but was unable to secure any perma-

nent improvement in his health; that he was injured across the small of the back and complained of his back, side and kidneys; that Dr. Light, Dr. Marsh and Dr. Hersey attended him at different times; that he was taken to the Long Hospital where he was treated for a time and he was also treated by Dr. Hersey after he came from the hospital; that he was confined to his bed from March 23, 1917, until his death on July 8, 1917; that Dr. Hersey began treating him in October, 1916.

Dr. Worthington testified that he made an examination of Paul Cruse on June 30, 1917, looked into the history of his case and diagnosed it as pulmonary tuberculosis; that the records of the Long Hospital showed that from June 30 to September 23, 1916, Cruse had been a patient there, suffering from acute nephritis; that he had night sweats, and swelling of the feet; that acute nephritis may develop from an injury; that night sweats are one of the cardinal symptoms of pulmonary tuberculosis, and they indicated that Cruse was suffering from that disease in June, 1916; that he was suffering from chronic nephritis when he saw him at his home; that chronic nephritis always follows acute nephritis and is always present in a wasting illness; that the history of the case led him to believe that the disease of tuberculosis from which Cruse was suffering was of long standing; that an injury to the back and kidneys of a crushing nature might develop acute or chronic nephritis; that chronic nephritis is a disease which as far as medical people know does not cure itself and will eventually cause death; that it is a wasting and debilitating disease, and reduces the power of resistance and makes the person so afflicted more susceptible to anything

infectious; that tuberculosis is an infectious and contagious disease; that everyone has "vagotomy" organisms in his lungs and they will become active when vitality is reduced; that the nephritis aggravated the condition that Paul Cruse was in and set the tuberculosis germs in action that later caused his death. The evidence shows that Dr. Hersey examined Cruse in November, 1916, and that in his opinion, based on the history of the case and the symptoms of the patient, his condition was the result of a former injury. The evidence shows that Dr. Marsh treated Cruse in September, 1915, for the injury to his back; that in May, 1916, he found him suffering from the same cause, manifesting the same symptoms, and in addition thereto he had swollen feet and nephritis; that the symptoms had continued and his present illness "is the result of the old injury from which he has not completely recovered." Dr. R. H. Bandilier testified that Mr. Cruse suffered from acute nephritis while in the Long Hospital; that a jarring injury such as the fall he received will sometimes cause acute nephritis; that in other instances such an injury may precipitate or bring on an impending nephritis, and in his opinion Cruse's injury probably increased the severity of the kidney disease from which he suffered.

In re Bowers (1917), 65 Ind. App. 128, 116 N. E. 842, this court said: "Likewise the courts, consistent with the theory of workmen's compensation acts, hold with practical uniformity that, where an employe afflicted with disease receives a personal injury under such circumstances as that he might have appealed to the act for relief on account of the injury had there been no dis-

ease involved, but the disease as it in fact exists is by the injury materially aggravated or accelerated, resulting in disability or death earlier than would have otherwise occurred, and the disability or death does not result from the disease alone progressing naturally as it would have done under ordinary conditions, but the injury, aggravating and accelerating its progress, materially contributes to hasten its culmination in disability or death, there may be an award under the compensation acts." See, also, *Taylorson v. Framwellgate Coal, etc., Co.* (1913), 6 B. W. C. C. 56; *Lewis v. Port of London Authority* (1914), 7 B. W. C. C. 577; *Southall v. Cheshire County News Co.* (1912), 5 B. W. C. C. 251; *Dean v. London, etc., R. Co.* (1910), 3 B. W. C. C. 351.

There is evidence tending to support the finding of facts. The board has drawn the necessary inferences, and there is evidence from which such inferences may reasonably be drawn. The evidence authorizes the inference that the accidental injury suffered by Cruse while in appellant's employment aroused the latent germs of the disease to which he was predisposed, materially accelerated the disease, and caused his death earlier than it otherwise would have occurred. *In re Meyers* (1917), 64 Ind. App. 602, 116 N. E. 314; *Columbia School Supply Co. v. Lewis* (1917), 65 Ind. App. 339, 116 N. E. 1.

The only questions presented by the assignment of errors have been considered. No question of the admissibility of evidence is presented. The death of the appellee having been suggested, the award of the full board is affirmed as of the date of submission.

NOTE.—Reported in 119 N. E. 32. Workmen's compensation: appeal and review under act, L. R. A. 1916A 163, 286, L. R. A. 1917D 186; Ann. Cas. 1916B 475, 1918B 647.

HALL v. BAUCHERT ET AL.

[No. 9,998. Filed December 13, 1917. Rehearing denied March 19, 1918.]

1. TRIAL.—*Conclusion of Law.—Exception.—Effect.*—By excepting to a conclusion of law the party excepting admits that the facts within the issues relating thereto are fully and correctly found. p. 207.
2. TRIAL.—*Finding of Facts.—Failure to Find Material Fact.—Effect.*—The failure to find a material ultimate fact is a finding against the party having the burden of proving such fact. p. 207.
3. JUDGMENT.—*Foreign Judgment.—Full Faith and Credit.*—As the Constitution requires that full faith and credit must be given to the public acts, records and judicial proceedings of every other state, where a court found that deceased was granted a divorce in Michigan, and there was nothing in the findings to overcome the presumption of regularity in the divorce proceedings, a conclusion of law that a woman whom deceased married subsequently to such divorce was his widow was not erroneous. p. 208.
4. WILLS.—*Construction.—Estates Created.—Devise of Fee Simple.*—An item in a will devising “all my property both real and personal * * * to my beloved children * * * share and share alike and subject to the conditions hereinafter set out,” is sufficient to devise a fee-simple title to one of testator’s children. p. 212.
5. WILLS.—*Construction.—Vesting of Estates.*—Where a testator devised real and personal property to his two children and in a subsequent item provided that “In the event my son * * * shall die without issue living at the time of his death,” his share should descend to the other child, the language used in such item had a fixed legal meaning, and referred to the death of the son within the lifetime of the testator. p. 212.
6. WILLS.—*Construction.—Estates Created.*—Under a will devising real and personal property to testator’s two children and further providing that in the event the son “shall die without issue living at the time of his death,” his share should descend to the other child, where the son survived the testator, but died intestate without children, his widow takes by inheritance the property devised. p. 212.

From Hamilton Circuit Court; *Ernest E. Cloe*, Judge.

Suit for partition of the real estate of Carey Hall,

deceased, wherein, on the death of John A. Hall, his widow, Lollage C. Hall, was admitted as a party defendant in his stead. From the judgment rendered on issues joined on her cross-complaint she appeals. *Reversed.*

Shirts & Fertig, for appellant.

Gentry & Campbell, for appellees.

FELT, J.—This is a suit for the partition of real estate on which Carey Hall died seized, and which he devised by his will. Appellant Lollage C. Hall is the widow of John A. Hall, only son of the testator. Appellee Edith Hall Bauchert is the only daughter of the testator, and appellees Carey Hall Bauchert, Merrill, Raymond W. and Guy T. Bauchert are her children. While the action was pending John A. Hall died intestate, and appellant, claiming to be his widow and sole heir at law, on her own application, was admitted as a party defendant in his stead. She thereupon filed an answer to the complaint against appellees, in which she alleged that she was the owner of one-half of the real estate in controversy as heir of her deceased husband, John A. Hall. The complaint was dismissed. The minor defendants filed an answer to the cross-complaint in general denial, by a guardian *ad litem*. The other defendants to the cross-complaint also answered by general denial. All defendants to the cross-complaint joined in a second paragraph of special answer, the substance of which is that appellee Edith Hall Bauchert owns a life estate in all the real estate and her said children a remainder in fee therein; that appellant has no interest in the real estate. The third paragraph of special answer to the cross-complaint alleges that John A.

Hall died intestate and unmarried, leaving appellee Edith Hall Bauchert his sole heir; that his pretended marriage to appellant was bigamous and void. Replies in general denial were filed to the special answers. Upon request the court made a special finding of the facts and stated its conclusions of law thereon.

The errors assigned by appellant are that the court erred in each of the second, third and fourth conclusions of law, and in overruling appellant's motion for a new trial. Appellees assigned cross-error based on the first conclusion of law. The finding of facts states in substance that Carey Hall died testate on October 15, 1915, the owner of the real estate in controversy, describing it; that decedent left surviving him his son, John A. Hall, and his daughter, Edith Hall Bauchert, his children and sole and only surviving heirs at law; that on February 11, 1911, said Carey Hall made and published his last will and testament, which was duly probated in the Hamilton Circuit Court on October 18, 1915, and is as follows:

“Item I. I will that all my just debts first be paid before any disposition is made of my property under the terms of this will. Item II. I will, devise and bequeath all of my property both real and personal of which I may die possessed, to my beloved children John A. Hall and Edith Hall Bauchert, share and share alike and subject to the conditions hereinafter set out in this will.

Item III. I will that in the event my son John A. Hall shall die without issue living at the time of his death, the portion of my estate which he will inherit under this will shall descend to my daughter Edith Hall Bauchert, subject to the condi-

tion hereinafter stated in item 4; however, in the event that my son John A. Hall shall die leaving issue living at the time of his death, that said portion of my estate inherited by him under this will shall descend to his issue in fee simple.

Item IV. I will that my daughter Edith Hall Bauchert shall have only a life estate in and to the real estate devised her under this will in item No. II, and which may afterward be acquired by her under item III from John A. Hall and that at her death said estate to descend to her children share and share alike the fee simple of said real estate to vest in her issue, which may be living at the time of my death or afterward born of her or of her children.

Item V. I hereby appoint John A. Hall to execute the terms of this my will and testament, without bond."

That John A. Hall died at Marion county, Indiana, on March 17, 1916, intestate, without issue born to him; that at the time of the death of the testator, Carey Hall, Edith Hall Bauchert had four children, viz., Raymond W., Guy T., Carey Hall and Merrill Bauchert, who are living and are her only children; that Marcus Bauchert is the husband of Edith Hall Bauchert. The finding then goes into great detail as to the marriage of John A. Hall to Virginia Tucker in 1877 and their subsequent relations. It shows that they lived together as husband and wife in Hamilton county, Indiana, until 1908, and that thereafter Virginia Hall obtained a decree for alimony and for separation from bed and board for a period of five years from May 2, 1910, from said John A. Hall. The court also finds that on August 8, 1910; John A. Hall

went to the State of Michigan, and that on September 3, 1912, he filed suit for an absolute divorce against Virginia E. Hall in the chancery court of Manistee county, said state, and alleged that he was a resident of said county and state, and that he had been for two years last past. He also alleged that said Virginia had deserted him in 1909, and charged other causes for divorce. The findings show that process was issued and publication of notice duly made, and on June 20, 1913, the case was tried, a finding made that the averments of the bill were true and that a decree of divorce was duly entered; that the laws of the state of Michigan authorize the granting of a divorce on proper proof and due notice when the party applying has been a resident of said state for two years prior to making application therefor; that said John A. A. Hall thereafter returned to Marion county, Indiana, and on July 9, 1913, made application for a license to marry appellant, stating under oath that he was then a resident of Marion county, Indiana; that a license was issued and in pursuance thereof appellant and said John A. Hall were married; that thereafter, at all times, until the death of said John A. Hall, they lived together as husband and wife, in good faith, and so conducted and represented themselves to their friends, neighbors and associates, and were so received and recognized by them; that on October 20, 1914, Virginia E. Hall duly obtained a decree of absolute divorce from said John A. Hall in the Tipton Circuit Court, State of Indiana; that the circuit court of Manistee county, Michigan, was a court of record of general jurisdiction and had jurisdiction in proceedings for divorce; that the laws of said state require such suits to be begun in the county where one

of the parties in interest resides; that the aforesaid proceedings in divorce were in conformity with the laws of the State of Michigan.

The trial court in this case found that it was the intention of Carey Hall that his son, John A. Hall, should have the use and benefit of one-half of all the property of which the testator died seized, and that after the death of said John A. "the fee simple absolute should pass to the issue (meaning children) of John A. Hall living at the time of his death and if no issue survived John A. Hall, then and in that event Edith Hall Bauchert should have a life estate in that part of the real estate formerly held by John A. Hall, and that the fee simple absolute should rest in the children of Edith Hall Bauchert, whether living at the time of the death of the testator or afterwards born. That the intention of Carey Hall was that one-half of all his property should go to Edith Hall Bauchert for life, with remainder in fee simple to the issue of her body, whether born before or after the death of the testator. That by the use of the words, 'Die without issue living at the time of his death,' the intention of the testator was that the words should relate to the death of John A. Hall, either before or after the death of the testator."

The court stated its conclusions of law as follows: "(1) The cross-plaintiff Lollage C. Hall was the lawful wife of said John A. Hall at the time of his death. (2) That under the will of said Carey Hall, the said John A. Hall took a life estate in and to the one-half part of the estate of said Carey Hall, including the land involved in this action and the words in said will, 'Shall die without issue living at the time of his death,' meant the death of John A. Hall. (3)

That said John A. Hall died intestate and without issue, and that upon his death, without issue, as per the will of said Carey Hall, the fee simple in and to said real estate vested in the children of Edith Hall Bauchert, and any children that may hereinafter be born of her subject to the life estate in said estate of said Edith Hall Bauchert. (4) That the cross-plaintiff is not entitled to recover on her cross-complaint and that defendants are entitled to judgment for their costs herein.”

Appellant excepted to each of the second, third and fourth conclusions of law, and to the first conclusion of law appellees separately and severally excepted.

We first consider the question arising on the assignment of cross-errors. Appellees made no motion

for a new trial and the only error assigned is

1. that the court erred in its first conclusion of law, which states that Lollage C. Hall was the lawful wife of John C. Hall at the time of his
2. death. By excepting to this conclusion of law, appellees admit that the facts within the issues

relating thereto are fully and correctly found. The failure to find a material ultimate fact is a finding against the party having the burden of proving such fact.

We have not set out all the findings of the court relative to the divorce proceedings. But there is no finding that John A. Hall procured his divorce in the State of Michigan by fraud, nor that he went to that state without a *bona fide* intention of becoming a resident thereof, nor that he did not in fact become a resident of such state prior to the institution of his suit for divorce, nor that the record of such court fails to show the requisite jurisdictional facts, includ-

ing notice to the adverse party as required by the laws of that state, nor is it found that the court did not have jurisdiction to try the case and grant the divorce under the laws of the State of Michigan. To the contrary, the findings show that the Michigan court before granting the divorce found and stated, of record, the jurisdictional facts of residence for two years in said state by the plaintiff, of due notice to the defendant according to the provisions of the statutes of that state and all the facts requisite to the entering of a valid decree. The trial court in this case also found that the chancery court had jurisdiction of the subject-matter and of the defendant by virtue of the process issued and notice given, and that the proceedings were in conformity with the laws of the State of Michigan in such cases made and provided.

There is nothing in the findings to overcome the presumption of the regularity of the proceedings in the Michigan court and the validity of the de-

3. cree entered granting an absolute divorce to John A. Hall from Virginia Hall. Our Constitution requires full faith and credit to be given to the public acts, records and judicial proceedings of every other state. We thus have before us a finding which not only fails to show the requisite facts to sustain appellee's contention, the burden of proving which rested upon them, but we have a finding which indicates a valid decree of divorce granted by the Michigan court to John A. Hall, before he married appellant. *Hood v. State* (1877), 56 Ind. 263, 270, 26 Am. Rep. 21; *Watkins v. Watkins* (1890), 125 Ind. 163, 25 N. E. 175, 21 Am. St. 217; *Compton v. Benham* (1909), 44 Ind. App. 51, 56, 85 N. E. 365; 14 Cyc 814-

816. It follows that the court did not err in its first conclusion of law.

We come now to a consideration of the questions which depend upon the meaning and effect of the will of Carey Hall, deceased. The trial court has stated in the finding of facts that "by the use of the words 'Die without issue living at the time of his death' the intention of the testator was that the words should relate to the death of John A. Hall either before or after the death of the testator," and that it was the intention of the testator that John A. Hall should only have a life estate in one-half of the real estate of which the testator died seized, and that in the event of the death of John A. Hall without leaving children surviving him, the fee-simple title to such real estate should rest in the children of Edith Hall Bauchert, whether living at the time of the death of the testator or afterwards born, subject to a life estate therein in favor of their mother.

But by the motion for a new trial appellant has challenged the sufficiency of the evidence to sustain the decision of the court. The only evidence relating to this branch of the case is the will and an agreement of the parties which is as follows:

"It is agreed between the parties, for the purpose of the trial of this cause, that Carey Hall died on the 15th day of October, 1915, a resident of Hamilton County, Indiana, and the owner in fee simple of the real estate involved in this action; and that he left surviving him his son John A. Hall and his daughter Edith Hall Bauchert, and unmarried and without father or mother living, and without having had any other children.

It is further agreed that the said John A. Hall died intestate on March 17, 1916, without leaving any issue surviving him, and without having had any children, and without father or mother living at the time of his death. It is further agreed that Edith Hall Bauchert is now living and is the cross-defendant in this cause; that she has the following children now living: Raymond W. Bauchert, Guy T. Bauchert, Carey Hall Bauchert and Merrill Bauchert, all under the age of twenty-one years; and that Marcus Bauchert is the husband of said Edith Hall Bauchert."

It thus appears that there is no evidence to sustain the findings last above set out, unless it be the provisions of the will itself. Such statements in the findings are therefore in the nature of conclusions of law, rather than ultimate facts, and do not aid the findings or give any support to the conclusions of law not found in the will itself. Since the will is in writing and the other essential facts are agreed upon and undisputed, this court has presented to it pure questions of law, the determination of which depend upon the intention of the testator as evidenced by the language of the will viewed in the light of the facts agreed upon by the parties.

Appellant contends that the language employed by the testator in making the devise to John A. Hall had a fixed legal meaning in this state when the will was executed; that we must presume the language employed was used advisedly in the light of such meaning; that by clause 2 of the will there was devised to John A. Hall the fee-simple title to one-half of the property, both real and personal, owned by the testator at the time of his death; that by the use of the

language in clause 3 of the will, viz., "*in the event my son John A. Hall die without issue living at the time of his death,*" the testator referred to such death of John A. Hall in the lifetime of said testator, and not to his death at any time either prior or subsequently to the death of said Carey Hall, the testator; that, inasmuch as John A. Hall survived the testator, the provisions of clauses 3 and 4, which deal with the portion of the estate devised to John A. Hall, never became operative; that upon the death of John A. Hall, subsequently to the death of the testator, appellant as his surviving widow and only heir at law inherited the one-half part of the real estate in controversy.

Appellees contend that the rules of construction contended for by appellant do not apply to the will under consideration; that the intention of the testator is clearly expressed by the provisions of the will which show that in no event was John A. Hall to have the fee-simple title to the portion of the real estate devised to him; that he was only given a life estate and upon his death, at any time, without children surviving him, the portion of the real estate so devised to him was to go to the children of his sister subject to her life estate therein.

So much has recently been written on the questions presented by this appeal that we deem it unwise to go into any extended discussion of the subject, and shall therefore in the main adopt the discussion of the same or closely analagous questions found in recent decisions of this court and our supreme court.

Applying the law as declared in such decisions to the case at bar, the following propositions seem to be

clearly established: (1) The language of item 4. 2 is sufficient in itself to devise a fee-simple title to John A. Hall. This proposition is strengthened by the fact that the clause disposes of both real and personal property by the same language. (2) The language of item 3 viz., "In the event my son John A. Hall shall die without issue living at the time of his death," as used in this will, has a fixed legal meaning and had such meaning when the will was executed, and refers to the death of said John A. Hall within the lifetime of the testator. (3) On the facts of this case, John A. Hall, having survived his father, took the fee-simple title to the undivided one-half part of the real estate and personal property of which the testator died seized. (4) John A. Hall having died intestate subsequently to the death of Carey Hall, his father, 6. leaving no children or descendants surviving him, appellant, his surviving widow, takes by inheritance the title to the real estate of which John A. Hall was seized at the time of his death. As supporting these conclusions see the following: *Alsman v. Walters* (1915), 184 Ind. 565, 106 N. E. 879, 111 N. E. 921; *Aldred v. Sylvester* (1915), 184 Ind. 542, 111 N. E. 914; *Busick v. Busick* (1917), 65 Ind. App. 655, 115 N. E. 1025, 116 N. E. 861, and cases cited; *Fowler v. Duhme* (1896), 143 Ind. 248, 251 (a), 275, 42 N. E. 623; *Clark v. Thieme* (1913), 181 Ind. 163, 103 N. E. 1068; *Skinner v. Spann* (1911), 175 Ind. 672, 700, 93 N. E. 1061, 95 N. E. 243; *Smith v. Smith* (1915), 59 Ind. App. 169, 109 N. E. 60; *Campbell v. Bradford* (1905), 166 Ind. 451, 77 N. E. 849; *Wright v. Charley* (1891), 129 Ind. 257, 28 N. E. 706; *Heilman v. Heilman* (1891), 129 Ind. 59, 64, 28 N. E. 310;

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Snodgrass v. Brandenburg (1904), 164 Ind. 59, 64, 71 N. E. 137, 72 N. E. 1030; *Aspy v. Lewis* (1898), 152 Ind. 493, 52 N. E. 756; *Taylor v. Stephens* (1905), 165 Ind. 200, 74 N. E. 980; *Clore v. Smith* (1909), 45 Ind. App. 340, 344, 90 N. E. 917.

For the reasons above shown, the judgment is reversed, with instructions to the lower court to restate its conclusions of law, in accordance with this opinion to the effect that appellant was the lawful wife of John A. Hall, deceased, at the time of his death; that upon the death of the testator his son, John A. Hall, under the provisions of the will of his father, Carey Hall, deceased, acquired the fee-simple title to the undivided one-half part of the real estate of which the testator died seized; that appellant as the surviving widow and only heir at law of John A. Hall, deceased, is the owner of the real estate of which John A. Hall died seized, and on her cross-complaint is entitled to recover the undivided one-half part of the real estate described therein, in fee simple, according to the value thereof, costs of suit, and to have judgment of partition as prayed for in her cross-complaint.

NOTE.—Reported in 117 N. E. 972. Wills: creation of fee-simple estate, 11 Am. St. 100, 40 Cyc 1574. See under (5, 6) 40 Cyc 1511.

HARLIN, GUARDIAN, v. AMERICAN TRUST COMPANY,
TRUSTEE.

[No. 9402. Filed March 20, 1918.]

1. **BANKRUPTCY.**—*Federal Bankruptcy Act.*—*Administration.*—*Enforcement of State Laws.*—The Bankruptcy Act, July 1, 1898, ch. 541, 30 Stat. at. L. 544, recognizes, and the federal courts in

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the administration of it enforce the laws of the states affecting dower, exemptions, the validity of mortgages and priorities of payment. p. 218.

2. **BANKRUPTCY.—Adjudication.—Effect on Wife's Interest in Lands—Right to Partition.**—Although during the life of the husband the wife's interest in his lands given her by §§3014, 3029 Burns 1914, §§2483, 2491 R. S. 1881, is inchoate and does not entitle her to assert title, under §3052 Burns 1914, §2508 R. S. 1881, such interest, on judicial sale of her husband's land, becomes absolute when not directed by the judgment to be sold or barred by such sale, and entitles her to partition as soon as his title is transferred by an adjudication to the trustee of the husband's estate in bankruptcy, and before the trustee has made a sale. p. 218.
3. **BANKRUPTCY.—Bankrupt's Estate.—Title and Possession of Trustee.**—Under the Bankruptcy Act, July 1, 1898; §70, §9654 Comp. St. 1916, vesting a trustee in bankruptcy with the title of the bankrupt, and §21 of the act, §9065 Comp. St. 1916, making a certified copy of the order approving the trustee's bond conclusive evidence of the vesting in him of the bankrupt's title, the trustee takes an absolute title carrying with it the right of possession. p. 221.
4. **BANKRUPTCY.—Bankrupt's Lands.—Trustee's Right to Partition.**—Under §1243 Burns 1914, §1186 R. S. 1881, providing that any person holding lands as joint tenant, or tenant in common, whether in his own right or as executor or trustee, may compel partition thereof, a trustee in bankruptcy, who takes an absolute title to the bankrupt's estate, can maintain an action for partition against the bankrupt's wife, who has acquired an absolute interest in his lands on the adjudication of bankruptcy. p. 222.
5. **PARTITION.—Action for.—Pleading.—Complaint.—Surplusage.**—A plaintiff who has an absolute right to partition is entitled to sue without giving the reasons why, and all averments of the complaint which are explanatory of his desire for partition are, therefore, surplusage. p. 222.
6. **BANKRUPTCY.—Partition of Bankrupt's Lands.—Jurisdiction of State Courts.**—An action by a trustee in bankruptcy seeking partition against a bankrupt's wife is a controversy arising out of the settlement of the estate of a bankrupt, as distinguished from a proceeding in bankruptcy proper, so that the state courts, and not the district federal court, have jurisdiction for the purpose of making the partition. p. 223.
7. **BANKRUPTCY.—Bankrupt's Land.—Partition.—Jurisdiction of Federal Court.**—A federal district court cannot authorize a trustee in bankruptcy to sell the wife's undivided interest in the

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bankrupt's lands, and can, at the most, only order the sale of the bankrupt's undivided interest. p. 223.

8. **BANKRUPTCY.—Conflict of Jurisdiction.—State and Federal Courts.**—Where the jurisdiction of a state court is invoked in a proceeding which involves a matter pertaining to the settlement of a bankrupt's estate, it should cautiously and in a spirit of judicial comity and courtesy inquire whether to act will result in a conflict of the courts, and, if it will not, the state court should then entertain the action and proceed to determine the controversy, but it will not be justified in arbitrarily refusing to act merely because a pleading bears on its face a suggestion of a possible conflict. p. 223.
9. **BANKRUPTCY.—Conflict of Jurisdiction.—State and Federal Courts.**—A conflict of state and federal courts does not arise out of the fact that, prior to the filing in the state court of a complaint for partition by a trustee in bankruptcy against the bankrupt's wife, the federal court had ordered the trustee to sell bankrupt's undivided interest, the trustee having decided that partition would be more advantageous to the creditors, and that he would not, therefore, pursue the order of sale made by the federal court. p. 223.
10. **BANKRUPTCY.—Bankrupt's Estate.—Partition Proceedings in State Court.—Validity.**—An action for partition of the bankrupt's lands instituted in the state court by the trustee in bankruptcy against the bankrupt's wife, wherein he asks to have the real estate sold, is not void, even though the federal court had previously ordered a sale of the bankrupt's undivided interest and the wife is fully protected in the benefits flowing to her from the partition proceedings. p. 224.
11. **BANKRUPTCY.—Complaint in Partition.—Sufficiency.—Permission to Sue.**—In an action in partition by a trustee in bankruptcy, the complaint need not aver that he had obtained permission from the federal court to bring the suit, since he derives his right to sue from the Bankruptcy Act, July 1, 1898, §23, §9607 Comp. Stat. 1916. p. 224.

From St. Joseph Circuit Court; *Walter A. Funk*, Judge.

Action by the American Trust Company, trustee in bankruptcy of the estate of Albert G. Harlin, against Wilbur A. Harlin, guardian of Emma W. Harlin, wife of the bankrupt. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

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John A. Hibberd, Alfred E. Martin and Stuart MacKibben, for appellant.

G. A. Farabaugh, for appellee.

DAUSMAN, J.—This action was instituted by appellee against appellant for partition. The trial court made a special finding of facts, stated conclusions of law thereon, decreed partition, and appointed a commissioner to execute the decree. The assignment of errors challenges the overruling of the demurrer to the complaint and each conclusion of law. The following is the substance of the material averments of the amended complaint: On December 5, 1913, Albert G. Harlin was duly adjudged a bankrupt by the Federal District Court for the District of Indiana, and thereafter the American Trust Company was duly appointed trustee of said bankrupt's estate; that said trust company is now the duly qualified and acting trustee in bankruptcy of said estate; that one Emma W. Harlin is the wife of said bankrupt; that she has been duly adjudged a person of unsound mind, and that said Albert G. Harlin is her duly qualified and acting guardian; that at the time the said Albert G. Harlin was adjudged a bankrupt he was the owner in fee simple of the following described real estate, situated in St. Joseph county, State of Indiana, to wit: (description of property); that at the time the said Albert G. Harlin was adjudged a bankrupt the said Emma W. Harlin was his wife, and as such wife she was the owner, by virtue of the laws of said state, of an inchoate interest in the above described real estate; that by reason of the adjudication in bankruptcy and of the appointment and qualification of the American Trust Company as trustee as aforesaid the said trust company

became the owner of all the right, title and interest of said bankrupt in and to the said real estate; that by virtue of said proceedings in bankruptcy the title to said real estate, formerly held and owned by said bankrupt, vested in said trustee, to be held by it for the benefit of the creditors of said bankrupt in accordance with the bankruptcy law of the United States; and that by reason of said proceedings in bankruptcy the inchoate interest of said Emma W. Harlin in and to said real estate became absolute, and thereupon she became entitled to have her portion set off to her in severalty; that said trustee in bankruptcy and the said Emma W. Harlin are the owners, as tenants in common, of the said real estate; and that the said trustee is the owner of the undivided three-fourths, and the said Emma W. Harlin is the owner of the undivided one-fourth of said real estate; that in February, 1914, said trustee was ordered by said district court to sell said real estate subject to the interest of the said Emma W. Harlin; that thereupon it advertised for bids, and to the best of its ability endeavored to sell said real estate; that said trustee received several bids for said real estate equal to the market value thereof, but that each of said bids was for the whole of an individual piece or parcel of land and not for any undivided portion or interest therein; that thereupon said trustee endeavored to induce the prospective purchasers to buy the bankrupt's undivided interest in said real estate, but that said bidders refused to buy unless they could procure the entire and undivided title in fee simple; that said trustee reported these facts to said guardian and submitted said bids to him, but that he refused to take any steps to aid in the sale of said real estate by

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offering for sale the interest of his said ward therein; that more than a year has elapsed and the trustee has been unable to dispose of its interest in said real estate solely by reason of the fact that no purchaser can be found who is willing to buy an undivided interest in said real estate; that partition of said real estate is necessary in order that the rights of the creditors of said bankrupt may be protected and the estate of said bankrupt closed, the assets thereof distributed, and the said bankrupt discharged; that the said real estate is not susceptible of partition by metes and bounds; that the premises will have to be sold and the proceeds divided according to the interests of the parties. Wherefore plaintiff prays that said parties be adjudged the owners of said real estate; that plaintiff have partition thereof; and that a commissioner be appointed, etc.

(1) The Bankruptcy Act recognizes, and the federal courts in the administration of it enforce, the laws of the states affecting dower, exemptions,

1. the validity of mortgages, priorities of payment, and the like. This plan is not objectionable because it leads inevitably to diversity of results. *Stellwagen v. Clum* (1918), 245 U. S. 605, 38 Sup. Ct. 215, 62 L. Ed. 507; *Hanover Nat. Bank v. Moyses* (1901), 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113.

Section 3029 Burns 1914, §2491 R. S. 1881, provides:

“A surviving wife is entitled, except as in section seventeen excepted, to one-third of all the real

2. estate of which her husband may have been seized in fee simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law, and also of all lands

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in which her husband had an equitable interest at the time of his death.”

Section 3014 Burns 1914, §2483 R. S. 1881 (designated in the foregoing section as “section seventeen”), provides: “That where the real estate exceeds in value ten thousand dollars, the widow shall have one-fourth only, and where the real estate exceeds twenty thousand dollars, one-fifth only, as against creditors.”

During the life of the husband the wife's interest in his lands, by virtue of said statutes, is inchoate—a mere expectancy or contingency. It does not enable her to assert title, and it gives her no right of possession or control. If she should die before her husband this inchoate interest is thereby extinguished. *Paulus v. Latta* (1884), 93 Ind. 34; *Thompson v. McCorkle* (1894), 136 Ind. 484, 499, 34 N. E. 813, 36 N. E. 211, 43 Am. St. 334. Nevertheless, by §3037 Burns 1914, §2499 R. S. 1881, this inchoate interest is protected and preserved for her as against judicial decree in proceedings to which she is not a party. Her said interest becomes consummate, matured, perfected, or absolute (1) upon the death of the husband (*Pattison v. Wert* [1899], 153 Ind. 453, 55 N. E. 227; *Fry v. Hare* [1905], 166 Ind. 415, 77 N. E. 803; *Ohio Farmers' Ins. Co. v. Bevis* [1897], 18 Ind. App. 17, 46 N. E. 928); and (2) on judicial sale, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale (§3052 Burns 1914, §2508 R. S. 1881.) The Supreme Court of Indiana has held that a conveyance by a judge or register in bankruptcy of the real estate of a bankrupt to his assignee is a judicial sale within the meaning of this statute, and that thereupon the inchoate interest of the bankrupt's wife in said real

estate becomes absolute and entitles her to partition. *Roberts v. Shroyer* (1879), 68 Ind. 64; *Ketchum v. Schicketanz* (1880), 73 Ind. 137, 143; *McCracken v. Kuhn* (1880), 73 Ind. 149, 151; *Haggerty v. Byrne* (1881), 75 Ind. 499, 502; *Lawson v. DeBolt* (1881), 78 Ind. 563, 565; *Leary v. Shaffer* (1881), 79 Ind. 567, 570; *Straughan v. White* (1882), 88 Ind. 242, 246; *Mattill v. Baas* (1883), 89 Ind. 220, 222; *Ragsdale v. Mitchell* (1884), 97 Ind. 458, 460; *Mayer v. Haggerty* (1894), 138 Ind. 628, 634, 38 N. E. 42. These cases rest on the ground that: "The adjudication is the foundation of the title. The title relates to and rests upon the adjudication. The assignee takes as a purchaser through the court. The transfer of the title follows the judgment of the court, and the assignee's title is derived through, and rests upon, the judgment and proceedings of the court and nothing else." *Straughan v. White, supra*, 247. We see no reason why these decisions should not apply with full force and effect to the case at bar. We have discovered nothing in the Bankruptcy Act now in force which makes them inapplicable, and therefore they are controlling.

But counsel for appellant contend that the rule above stated is unsound and that it should be held that the wife's inchoate interest cannot become absolute until the trustee in bankruptcy has made a sale. Why should the guardian of the wife of the bankrupt make this contention? In the very nature of things, a rule of law which operates to convert a wife's inchoate interest (a mere expectancy) into an absolute estate at the earliest possible moment must be beneficial to her. Suppose the rule to be as counsel contend, and that there should be considerable delay in

making a sale, and that before the completion of the sale the wife should die, leaving her husband surviving, then her death would extinguish her inchoate interest, she would have derived no benefit from it in her lifetime, her heirs would inherit no interest in the real estate, and the bankrupt's creditors would take it all.

(2) Having determined that the wife of a bankrupt has the right of partition as against the trustee in bankruptcy, by what process of reasoning

3. is it possible to reach the conclusion that the trustee does not have that right as against the wife? Section 70, Bankruptcy Act (§9654 Comp. Stat. 1916) provides: "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, * * * shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt * * *." Section 21, Bankruptcy Act (§9605 Comp. Stat. 1916) provides: "A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened."

The trustee in bankruptcy takes title as if by purchase. 5 Cyc 341. He takes an absolute title which, of course, carries with it the right of possession. *Boyd v. Olvey* (1882), 82 Ind. 294, 305; *Keck v. Noble* (1882), 86 Ind. 1, 3; *Acme Harvester Co. v. Beekman Lumber Co.* (1911), 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208.

Section 1243 Burns 1914, §1186 R. S. 1881, provides:

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“That any person holding lands as joint tenant, or tenant in common, whether in his own right

4. or as executor or trustee, may compel partition thereof in the manner provided in this act.”

Notwithstanding this statute, appellant has called our attention to *Hobbs v. Frazier* (1908), 56 Fla. 796, 47 South. 929, 20 L. R. A. (N. S.) 105, 131 Am. St. 179, 16 Ann. Cas. 558, and *Lindsay v. Runkle* (1910), 82 Ohio St. 325, 92 N. E. 489, 29 L. R. A. (N. S.) 659, 137 Am. St. 781, as sustaining the proposition that a trustee in bankruptcy cannot maintain an action for partition. The statutes on which these two cases severally rest differ materially from ours. §1941 Gen. Stat. Fla.; §9291 Laning's Rev. Stat. Ohio. For this reason alone, and without expressing any opinion as to other features of these cases, we must decline to follow them.

The general rule is that the right to partition is absolute. 30 Cyc 177. Certainly it is absolute under our statute. One who is entitled to have partition

5. tion may assert that right arbitrarily. To force partition of a given tract of land at a given time may be wise or unwise, may result in profit or loss to the owners; but these considerations are not to be regarded by the courts. In the case at bar the trial court could not determine whether partition would be advantageous or disadvantageous to the creditors represented by the trustee. He is entitled to have partition without giving the reasons why. Therefore, all the averments of the complaint which state his reasons for desiring partition are surplusage.

(3) The case at bar is “a controversy arising out of the settlement of the estate of a bankrupt” as dis-

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tinguished from “a proceeding in bankruptcy 6. proper.” Therefore the state courts have jurisdiction. The district court did not have jurisdiction for the purpose of making partition of the real estate. *In re Eash* (1907), (D. C.) 157 Fed. 996; *Bardes v. Hawarden Bank* (1899), 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *First Nat. Bank, etc. v. Chicago, etc., Trust Co.* (1904), 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051; 1 Loveland, *Bankruptcy* (4th ed.) §25 *et seq.*; 3 R. C. L. 180, §20 *et seq.*; 7 C. J. 254 *et seq.*

The district court could not authorize the trustee to sell the wife's undivided interest. The most that

7. court could do was to order the sale of the undivided interest of the bankrupt. 1 Loveland, *Bankruptcy* (4th ed.) §426. That order having been made by the district court, did the action

8. of the state court create a conflict? Where the jurisdiction of a state court is invoked in a proceeding which involves a matter pertaining to the settlement of a bankrupt's estate, it should cautiously and in a spirit of judicial comity and courtesy inquire whether to act will result in a conflict of courts. If that question be answered in the negative, it should then entertain the action and proceed to determine the controversy. It will not be justified in arbitrarily refusing to act merely because a pleading bears on its face a suggestion of a possible conflict. In the case at bar there can be no conflict of courts unless

9. it arise out of the fact that prior to the filing of the complaint for partition the district court had ordered the bankrupt's undivided interest to be sold by the trustee in bankruptcy. The partition proceeding resulted in the appointment of a

different person as commissioner to sell the entire tracts, including the identical interest which the trustee had been ordered to sell. The complaint shows that this result was anticipated and invited by the trustee. It was not forced upon him by the state court but was done by his own procurement. He decided for himself that partition would be advantageous to the creditors; that he would not pursue the order of the court of bankruptcy; and that he would invoke the jurisdiction of the state court as a matter of right under the state law. He voluntarily relinquished his right to sell under the order of the district court and elected to receive the proceeds derived from the sale to be made by the commissioner appointed by the state court; and the state courts need not concern themselves about the result of his conduct as between him and the creditors whom he represents. Manifestly

the only interest appellant can have in this
 10. feature of the case is to protect his ward against the expense of a futile proceeding. But the proceeding is not void and appellant's ward is fully protected in the benefits flowing to her from the partition proceedings. *Sharon v. Terry* (1888), (C. C.) 36 Fed. 337, 1 L. R. A. 572; notes to *Louisville Trust Co. v. City of Cincinnati* (1896), 22 C. C. A. 334; *Acme Harvester Co. v. Beekman Lumber Co.*, *supra*; 7 R. C. L. 1067 *et seq.*

It was not necessary, as counsel contend, that the complaint should contain an averment that the trustee in bankruptcy had obtained permission

11. from the district court to bring suit for partition. The trustee's right to sue is derived from the statute. §23, Bankruptcy Act; 2 Loveland,

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Bankruptcy (4th ed.) 1040 *et seq.*; 3 R. C. L. 265 *et seq.*

The court did not err in overruling the demurrer to the complaint, and all questions raised by the exceptions to the conclusions of law are fully covered by what we have said concerning the ruling on the demurrer.

Judgment affirmed.

NOTE.—Reported in 119 N. E. 20. Bankruptcy: right of trustee to maintain partition, 20 L. R. A. (N. S.) 105; 16 Ann. Cas. 560. See under (1) 7 C. J. 354; (2) 7 C. J. 116; (6) 7 C. J. 257; (7) 7 C. J. 254; (8, 9) 7 C. J. 259; (10) 7 C. J. 250.

INDIANAPOLIS ABATTOIR COMPANY v. BRYANT.

[No. 10,166. Filed March 20, 1918.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Claimant's Refusal to Permit Autopsy.—Jurisdiction of Industrial Board.*—Although §27 of the Workmen's Compensation Act, Acts 1915 p. 392, provides that the employer, or the Industrial Board, shall have the right in any case to require an autopsy, the refusal of the next of kin to consent thereto does not deprive the board of jurisdiction to proceed to a final disposition of the case. p. 228.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Waiver of Autopsy.—Jurisdiction of Industrial Board.*—Although claimant refused consent, the employer waived the right to an autopsy, as provided by §27 of the Workmen's Compensation Act, Acts 1915 p. 392, where it made no objection before the Industrial Board until after the trial and award, and it was then too late to question the board's jurisdiction of the subject-matter and of the parties. p. 228.
3. MASTER AND SERVANT.—*Workmen's Compensation Act.—Construction.—Right to Autopsy.*—Section 27 of the Workmen's Compensation Act, Acts 1915 p. 392, giving the employer the right to require an autopsy in case of accidental death of an employee does not give the employer the right of an autopsy where the

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cause of death is clearly apparent without it, and the right should be exercised with caution. p. 229.

4. **MASTER AND SERVANT.**—*Workmen's Compensation Act.*—*Autopsy.*—*Refusal.*—Where a claimant for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, told the employer's agent that she would not allow an autopsy unless it was absolutely necessary, but that she would talk with the employer, who failed to see her in reference to the matter, there was no unequivocal refusal to grant the employer the right to an autopsy as provided in §27 of the act. p. 230.

From the Industrial Board of Indiana.

Proceedings under the Workmen's Compensation Act for compensation by Rebecca Bryant against the Indianapolis Abattoir Company. From an award for applicant, the defendant appeals. *Affirmed.*

Taylor, Carter & Wright, for appellant.

Means & Buenting, for appellee.

IBACH, C. J.—This is an appeal from the finding and award of the full Industrial Board. The board found the facts to be substantially as follows: On June 20, 1917, one John Bryant was in the employment of appellant at an average weekly wage of \$12.25. On said date he received a personal injury by accident arising out of and in the course of his employment, resulting in his death on July 1, 1917. Appellant had actual knowledge of the accidental injury at the time it occurred, administered to him first-aid treatment at the time of the injury, furnished him an attending physician on June 23, 1917, and filed a report of such injury with the board on June 29, 1917. Decedent left surviving him as his sole and only dependent appellee. That decedent's body was embalmed on the evening of July 1, 1917, and on the afternoon of July 2, 1917, appellant made a formal request of appellee for an autopsy upon the

body of decedent, whereupon she informed it she did not desire an autopsy and would not consent to one unless it were absolutely necessary. Appellant did not follow up such request and did not advise her that an autopsy was necessary. At the time the autopsy was requested the body had been embalmed and it would have availed nothing then in the determination of the cause of the death.

The provision of the statute here involved, reads: "The employer, or the Industrial Board, shall have the right in any case of death to require an autopsy at the expense of the party requiring same." §27 Workmen's Compensation Act, Acts 1915 p. 392.

Appellant contends in effect that said provision confers upon employers an express mandatory right to require an autopsy in the event of the death of an employe which must be respected; that the death in and of itself vests such right, and when it is asserted by an employer it cannot be disregarded; that the board was without power in this case to make a final disposition until such autopsy was held.

It is further contended that: "The evidence discloses and is uncontradicted that the employer asserted the right of autopsy by making demand upon the next of kin, who, in law, had the custody and the legal right to dispose of the body of the deceased, one of whom was appellee, and this right upon such request and demand was absolutely and unequivocally denied; that it had done all that the law required it to do for the purpose of enforcing its right to an autopsy." On the other hand appellee insists that the evidence does not show an absolute refusal and in any event appellant was not harmed thereby.

Appellant has raised a jurisdictional question,

namely, the right of the board to proceed to a final disposition of the case without requiring an autopsy. We will first determine such question. It will be observed that the statute in question contains no provision for making an autopsy further than the mere grant of the right, and provides no penalty or condition in case the claimant refuses to consent to it. Neither can it be implied from the statute as a whole that the legislature intended any penalty to follow a refusal.

In our judgment the refusal of a claimant to consent to an autopsy would not deprive the board of jurisdiction to proceed to a final disposition

1. of the case. But there is another reason why appellant should not be permitted at this time to question the jurisdiction of the board. So
2. far as the record discloses, appellant filed no plea in abatement, made no attempt to renew its request for an autopsy before the board, and permitted the cause to proceed to trial before less than the full board without any objection until after the hearing was concluded and an award made in favor of appellee. It was then too late to make such an objection where the board had jurisdiction of the subject-matter and of the parties.

The right to demand an autopsy was a right that could be waived, and in our judgment was waived under the facts of this case. As heretofore stated, the refusal of a claimant to consent to an autopsy carries no penalty. Nothing could be lost by appellee by her action. The only benefit to which appellant could lay claim was the right to an autopsy. Its failure, therefore, to follow up its request in some manner must be construed as a waiver of such right.

What we have said would fully dispose of this appeal, but in view of the character of the question it is of sufficient interest to warrant further con-

3. sideration. This is the first case in this state and no foreign case has been called to our attention, and we have found none, involving the construction of a similar statutory provision. The purpose of the law-making body in enacting such statute was no doubt for the protection of the employer against unjust claims, particularly against the payment of compensation where death is due to natural causes instead of by accident. We do not believe that it was the intention of the legislature that an autopsy could be demanded in every case of death. Such a construction would render the provision unreasonable where the cause of death is clearly apparent without it,—where the cause of the death is not uncertain and is not in dispute. The right to an autopsy is to be exercised with caution. It is one calculated under the most favorable circumstances to cause some distress of mind to the family of the deceased.

There was a dispute in this case as to the cause of decedent's death, and under the construction of the statute herein declared, appellant had the right, if properly exercised, to have an autopsy performed. Where, as here, the legislature has not provided the procedure for its enforcement, that adopted must be reasonable both as to the time and the occasion for its exercise.

Appellant assumes that the evidence shows that appellee's refusal to consent to an autopsy on the body of decedent was absolute and unequivocal. This is not supported by the record. There is evidence

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tending to show that decedent died on July 1, 4. 1917, and that the next afternoon a representative of appellant came to see whether or not a *post mortem* examination could be held. Appellee told him that unless it was absolutely necessary she did not want it done. The representative stated that Mr. Johnson sent him, and appellee asked him to have Mr. Johnson come and she would talk to him. The representative then stated that he merely came to ask about it. Mr. Johnson never came. This was after the body had been embalmed. The embalming had taken place on Sunday and the request for an autopsy was made Monday afternoon. It is not shown that appellant's representative had any physician or any one with him to perform the work when the request was made. It might have been if appellant had sent a physician to make the examination that appellee would not have made any objection. Can it be said that the evidence above set out shows an unequivocal refusal to grant appellant the right conferred by statute? We conclude not. *Indiana Bond Co. v. Jameson* (1899), 24 Ind. App. 8, 12, 56 N. E. 37.

Award affirmed.

NOTE.—Reported in 119 N. E. 24.

HOFFMAN v. HOFFMAN.

[No. 9,513. Filed March 20, 1918.]

1. DIVORCE.—*Actions.—Residence Affidavit.—Requirements.—Statute.*—Section 1066 Burns 1914, §1031 R. S. 1881, requiring that plaintiff in an action for divorce shall, with his petition, file an

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affidavit subscribed and sworn to by himself, stating the length of time he has been a resident in the state, and stating particularly the place, town, city or township in which he has resided for the last two years past, and stating his occupation, is mandatory and must be substantially complied with, and an affidavit filed with a divorce complaint reciting that affiant was the plaintiff, that he had been a resident of the State of Indiana for more than five years last past and for more than six months last past had resided in a named city at a specified address, and that he was by occupation an assembler, did not substantially comply with the requirements of the statute. p. 232.

2. **DIVORCE.—Actions.—Residence Affidavit.—Necessity.**—As the affidavit as to plaintiff's residence, required by §1066 Burns 1914, §1031 R. S. 1881, to be filed in an action for divorce, is made a prerequisite by the statute to the right of divorce, a decree based on an insufficient affidavit is contrary to law and must be set aside. p. 237.

From Fayette Circuit Court; *P. W. Bartholomew*, Special Judge.

Action by George D. Hoffman against Dessie D. Hoffman. From a judgment for plaintiff, the defendant appeals. *Reversed.*

Kiplinger & Smith, Megee & Ross and McKee, Wiles & Elliot, for appellant.

G. Edwin Johnston, for appellee.

HOTTEL, J.—This is an appeal by appellant from a judgment against her in which appellee was granted a divorce and the custody of their minor child. Appellant filed a motion for a new trial, which was overruled, and this ruling is assigned as error. The grounds of said motion relied on for reversal are those which respectively challenge the decision of the trial court as being contrary to law, and as not being sustained by sufficient evidence.

In support of her contention that the decision is contrary to law, it is urged that the trial court was

without jurisdiction of the case “because
1. proper affidavit was not filed with the complaint.” Said affidavit, omitting caption, is as follows:

“George D. Hoffman being duly sworn upon his oath says:

“That he is the plaintiff in the above entitled cause of action; that he has been a resident of the State of Indiana for more than five years last past, and for more than six months last past he has been a resident of the city of Connersville, County of Fayette, State of Indiana, and has, during said time, resided at the following named places, to wit: No. 907 Eastern Avenue, in said city of Connersville; that he is by occupation an assembler.”

The statute which makes the filing of an affidavit necessary in such cases is §1066 Burns 1914, §1031 R. S. 1881. The part thereof affecting the question involved is as follows: “And the plaintiff shall, with his petition, file with the clerk of the court an affidavit subscribed and sworn to by himself, in which he shall state the length of time he has been a resident in the state, and stating particularly the place, town, city or township in which he has resided for the last two years past, and stating his occupation, which shall be sworn to before the clerk of the court in which his complaint is filed.”

It is claimed that the affidavit, *supra*, is insufficient because of its failure to set out all the essentials of this statute. Among the omissions pointed out and urged by appellant is the following: “It does not state particularly the place, town, city or township in

which appellee has resided for two years immediately preceding the filing of his complaint.”

It will be observed that the only attempt in said affidavit to state with particularity the place of appellee's residence is for the *six months* next preceding the filing of his affidavit. The affidavit shows nothing as to his residence for the preceding eighteen months of the said *two years* other than the general statement showing his residence in the state for more than five years. It is well settled that said statute is mandatory, that it must be substantially complied with, and that the affidavit provided for therein *must contain all the things required by such statute*. *Smith v. Smith* (1916), 185 Ind. 75, 113 N. E. 296, 297; *Wills v. Wills* (1911), 176 Ind. 631, 633, 96 N. E. 763, and cases there cited; *Miller v. Miller* (1913), 55 Ind. App. 644, 104 N. E. 588. It is conceded by appellee that said statute is mandatory, but it is insisted in effect that a substantial compliance with its requirements is all that is contemplated, and that when the purpose and intent of the statute is looked to, it will be seen that the affidavit, *supra*, contains the substance of all that the statute requires. In support of this contention appellee cites and relies on *Maxwell v. Maxwell* (1876), 53 Ind. 363; *Blauser v. Blauser* (1909), 44 Ind. App. 117, 87 N. E. 152; *Eastes v. Eastes* (1881), 79 Ind. 363, 369; *Wills v. Wills, supra*; *Brown v. Brown* (1894), 138 Ind. 257, 37 N. E. 142; *Miller v. Miller, supra*.

The cases cited recognize the legal propositions involved in appellee's contention, but they by no means support the ultimate conclusion which he seeks to have drawn therefrom; that is to say, the cases cited in effect hold that a substantial compliance with

the statute, *supra*, will satisfy its requirements, and that in determining what constitutes such compliance therewith the purpose and end to be accomplished by the statute should have influence; but there is nothing in either of the cases cited, or in any other case that we have examined, that will justify a conclusion either that the courts have ever "relaxed the requirement of the statute," or that the affidavit under consideration meets such requirements.

In the case last cited this court had before it the question now being considered. It recognized the rules above indicated, viz., that substantial compliance with said statute is sufficient, and that in determining whether there had been such compliance it is proper to look to the intent of the act. In this connection, it quotes with approval from the case of *Eastes v. Eastes, supra*, as follows: "Manifestly, the legislative intent in the enactment of these provisions was to limit the operation of the statute to *bona fide* residents of the State, and to restrain and prevent the procurement of divorces by nonresidents, through fraud or imposition practiced on the courts."

In the case there under consideration there was no affidavit, but the complaint itself was sworn to, and the court, following the case of *Stewart v. Stewart* (1901), 28 Ind. App. 378, 62 N. E. 1023, held that the statute was complied with if the complaint, in addition to the averments necessary to the statement of the cause of action, contained the additional averments required by the statute to be contained in said affidavit. The question whether the complaint contained such additional averments is then discussed, and the court expressly recognized the three essentials of the statute, viz.: (1) The statement of

the length of time the plaintiff has resided in the state; (2) the necessity for stating particularly the place, town, city or township in which he has resided for the past *two years*; and (3) the statement of his occupation. The court then holds that the complaint contains by way of general averment the equivalent of the first and third essentials, *supra*, but that it contains no general averment as to the town, city or township in which the plaintiff resided during the two years immediately preceding the filing of the complaint. The court then at length and in detail set out certain specific facts shown by such complaint for the purpose of showing that such specific facts were the equivalent of the general averment required by the statute, thereby, in effect, holding that such general statement or its equivalent is one of the things made essential by said statute. This case, instead of supporting appellee's contention in the case at bar, impliedly, if not expressly, holds the contrary. True, in the instant case, the appellee stated particularly his residence for six months immediately prior to the making of the affidavit, but this is not a compliance with either the letter or the spirit of a statute requiring that such residence be stated with particularity for the two years next preceding the filing of such affidavit. This is especially so when we look to the legislative intent in the enactment of such provision, and appellee concedes that such intent should be looked to.

The purpose and intent of the statute being as above indicated, viz., to limit its operation to *bona fide* residents of the state, and to prevent the procurement of divorces by nonresidents through fraud or imposition practiced on the courts, it places upon the plaintiff in such cases the duty of stating particularly the place of his residence as therein pro-

vided for the full period of two years, so that the state may be placed in the possession of the facts from which it may protect itself against the fraud or imposition indicated.

The statute requires a residence in the county for six months and in the state for two years. These facts are jurisdictional and must be alleged in the complaint and proved upon the trial. The affidavit required to be filed with the complaint as above indicated was intended to furnish the state the means of ascertaining whether such jurisdictional facts, required to be alleged and proved, were in fact true. The affidavit here involved complied with the statute to the extent that it particularly stated appellee's place of residence for the six months preceding the filing thereof, and hence furnished the state the means of ascertaining whether the appellee had resided in the county the required six months, but it wholly failed to state the facts required by the statute which would have furnished the state the means of ascertaining whether he had been a *bona fide* resident of the state for *two years*. The latter requirement is just as essential and just as much a part of the statute as is the first, and no good reason could be given for the omission of either that would not equally apply to the other, and to hold that either may be ignored would render that provision of the statute requiring the plaintiff to state particularly his place of residence for the two years next preceding the institution of his suit for divorce a nullity. We therefore conclude that the affidavit, *supra*, was not sufficient in the respect indicated.

The filing of said affidavit is by said statute made a prerequisite or condition precedent to the right of

divorce, and hence any decree of divorce made

2. without it or with one that fails to contain the essentials of the statute is contrary to law. *Fairbanks v. Warrum* (1913), 56 Ind. App. 337, 345, 351, 104 N. E. 983, 1141; *Equitable, etc., Ins. Co. v. Stout* (1893), 135 Ind. 444, 457, 33 N. E. 623.

Other objections are made to said affidavit, but our conclusion as to that just considered makes consideration of the others unnecessary.

It is also contended that the appellee failed to meet the requirements of §1066, *supra*, in that he failed to prove by two resident householders and freeholders of the state that he was a *bona fide* resident of the state and county at the time of the filing of his complaint, for the respective periods required by the statute; but as the judgment must be reversed and a new trial ordered for the reason already indicated, no good purpose can be served by a determination of any question involving the sufficiency of the evidence. In any event, the evidence in all probability will be supplemented in said respect at another trial.

For the reasons indicated, the judgment below is reversed, with instructions to the trial court to grant a new trial and permit appellee to file an amended affidavit, if he so desires, and for such other proceedings as may be consistent with this opinion.

NOTE.—Reported in 119 N. E. 18. Divorce: necessity of alleging jurisdictional residence in proceeding, 12 L. R. A. (N. S.) 1107. See under (1, 2) 14 Cyc 663.

VANDALIA RAILROAD COMPANY v. STEVENS.

[No. 9,069. Filed January 23, 1917. Rehearing denied June 1, 1917.
Transfer denied March 22, 1918.]

1. **CARRIERS.—Carriage of Passengers.—Complaint.—Sufficiency.—Relation of Carrier and Passenger.**—In an action against a railroad for personal injuries sustained by plaintiff while riding on a miner's train, a complaint alleging that "plaintiff took passage on one of defendant's said passenger trains upon said railroad, to be carried" to a certain city, is sufficient as against a demurrer on the ground that it did not show that plaintiff was a passenger and such allegation is strengthened rather than weakened by a further averment that plaintiff was required to pay only \$1.50 a month for passage. p. 241.
2. **APPEAL.—Review.—Ruling on Demurrer.—Scope of Review.**—The court on appeal, in reviewing a ruling sustaining a demurrer to an answer is not limited to the objections stated in the memorandum accompanying the demurrer, but may consider, for the purpose of sustaining the trial court's ruling, any defects fatal to the sufficiency of the answer. p. 247.
3. **CARRIERS.—Negligence.—Contracts Limiting Liability.—Force and Effect.**—Although a common carrier cannot limit its common-law liability by any general notice, it may, by special contract with the shipper, limit its liability as insurer, but in so far as the special contract attempts to exonerate it from any loss to which its own fault or negligence has contributed, it will be treated as against public policy and void. p. 252.
4. **CARRIERS.—Common Carriers.—Statute.—Scope.**—Section 5271 Burns 1914, §3925 R. S. 1881, prescribing the duty of railroads as to running trains, etc., and making such companies common carriers, does not contemplate that every carriage of passengers and goods undertaken by them under special contracts, and different from that undertaken by, and required of, such companies, shall be treated as common, rather than private carriage. p. 253.
5. **CARRIERS.—Liability.—Limiting by Special Contract.**—A common carrier cannot, by words of its contract, convert itself into a private carrier, where the transportation undertaken and the duties and responsibilities incident thereto are such as are ordinarily incident to a common carrier, but whether in a particular case the common carrier should be treated as a private carrier, does not necessarily depend on whether a special contract was entered into for the carriage, nor upon the wording or pro-

visions of the contract, but rather upon the nature and character of the carriage or transportation contracted for, and whether the duties and obligations flowing therefrom are those which the carrier owed to the individual contractor, as a common carrier or only those which it could be required to perform as a private carrier. p. 255.

6. CARRIERS.—*Carriage of Passengers.—Common Carrier.—Limitation of Liability by Contract.*—Where a railroad company ran a branch line from its main line to a coal mine and operated thereon regular passenger and freight trains, and the owner of the mine contracted with the railroad for exclusive daily carriage of the miners to and from work, they in turn agreeing with the mine owner that he could deduct \$1.50 per month from their wages for such transportation, which was under the entire control of the railroad, the railroad was a common carrier of passengers, and not a private carrier, so that it could not by contract limit its liability as a common carrier. pp. 257, 261.
7. CARRIERS.—*Negligence.—Liability.—Limiting by Contract.*—Except in cases where a passenger is riding on a gratuitous pass, a common carrier of passengers cannot, by its contract, relieve itself from liability for its own negligence. p. 260.
8. APPEAL.—*Review.—Harmless Error.—Instructions.*—The giving of an instruction which is open to criticism, but the infirmities of which are not of a kind as would likely be prejudicial or harmful, is not a ground for a reversal in view of §700 Burns 1914, §658 R. S. 1881, inhibiting reversals for errors which are merely technical. p. 262.

From Knox Circuit Court; *Benjamin M. Willoughby*, Judge.

Action by Ira Stevens against Vandalia Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Clarence B. Kessenger, Pickens, Moores, Davidson & Pickens, D. P. Williams and John G. Williams, for appellant.

William H. Hill, for appellee.

HOTTEL, J.—This is an appeal from a judgment for \$500, recovered by appellee in an action brought by him against appellant to recover for personal inju-

ries alleged to have been sustained by him while on a train operated by appellant, between the mine of the "Indian Creek Coal and Mining Company," where appellee was employed as a miner, and the city of Vincennes. The complaint is in one paragraph and proceeds upon the theory that appellee was a passenger upon appellant's train when injured, and that his injuries were caused by appellant's negligence. A demurrer to the complaint, accompanied by proper memorandum, was overruled, and such ruling is here assigned as error and relied on for reversal.

It is insisted that the averments of the complaint do not show that the relation of passenger and carrier existed between appellant and appellee at the time the latter received the injuries of which he complains.

The averments of the complaint necessary to an understanding of such question, and other questions hereinafter considered, are in substance as follows: Appellant owned and operated a railroad from Indianapolis to Vincennes, with branch roads or spurs leading off of such main line. One of such spurs left the main line between Bruceville and Bicknell in Knox county, and extended into the Indian Creek coal mine. In operating its main line and branches appellant owned and used thereon a number of locomotive engines and trains of cars, both freight and passenger, and operated passenger trains thereon drawn by its locomotive engines. On February 29, 1912, "*plaintiff took passage on one of defendant's said passenger trains upon said road, to be carried to the city of Vincennes, Indiana; that he boarded said train at said Indian Creek coal mine; that for passage over said road from said * * * mine to * * * Vincennes * * * plaintiff was required*"

to pay * * * \$1.50 per month." Plaintiff boarded said train at said mine "and entered the passenger coach near the front end * * * about twelve feet from the * * * stove * * *; that the agents of * * * defendant set the air brakes on said coach and then uncoupled the engine * * * and * * * did some switching in and about said mine; that said coach was left standing on a steep grade * * *; that by reason of deficient air-brake equipment and deficient air connection the air brakes on said coach became released; that upon the releasing of said air brakes said * * * coach and the caboose coupled with it started to * * * run down grade * * *." Immediately upon the coach starting to run down grade the engine which had been used for switching was, by the agents of * * * defendant, run backward toward said * * * coach; that said coach and caboose * * * collided with * * * said engine; that said collision caused * * * plaintiff to be thrown * * * about twelve or fifteen feet to the heating stove * * * heated to a red heat," etc. (Our italics.)

As against a demurrer the italicized averments, *supra*, make the complaint sufficient to withstand appellant's said objection. *Indiana Union Traction Co. v. McKinney* (1906), 39 Ind. App. 86,

78 N. E. 203; *Ohio, etc., R. Co. v. Craucher* (1892), 132 Ind. 275, 31 N. E. 941; *Walther v. Southern Pacific Co.* (1911), 159 Cal. 769, 116 Pac. 51, 53, 37 L. R. A. (N. S.) 235.

We cannot agree with appellant's contention that the effect of such averment is destroyed by the words which follow, showing that appellee was required to pay only \$1.50 a month for such passage. The effect

of the latter averment is to strengthen rather than to weaken the former.

To said complaint the appellant filed an answer in three paragraphs, the first being a general denial.

The second paragraph is predicated on a contract entered into between appellant and the mining company by the terms of which the appellant *undertook to contract as a private carrier* to carry the employes of said mine from their homes at Vincennes to their place of work at said mine and return, with a proviso to the effect that appellant should not be liable for any damages to any employe on account of injury or death resulting to such employe, while on, or getting on or off appellant's said train, no matter how such injuries were caused. Said paragraph of answer avers that it was under and pursuant to such contract that appellee was on said train when injured; that appellee had paid appellant nothing for his passage; that the \$1.50 paid by him, as averred in the complaint, was paid to the mining company toward the expense of running such train, and for the privilege of being carried thereon to and from his work. Said contract is made part of the answer, and is as follows:

“Whereas, Indian Creek Coal & Mining Company, a corporation under the laws of the State of Indiana, owns and operates a coal mine located in Knox county, State of Indiana, on the Knox County Coal Branch of the Vincennes Division of the Vandalia railroad, and

“Whereas, said Indian Creek Coal & Mining Company has requested Vandalia Railroad Company, a consolidated corporation organized and existing under the laws of the states of Indiana

and Illinois, to furnish said Indian Creek Coal & Mining Company special facilities for getting miners living in the city of Vincennes and the immediate vicinity, and employed by said coal company, to and from said mine, and,

“Whereas, said Vandalia Railroad Company is not a common carrier of passengers for hire over said branch of its Vincennes division and does not operate any passenger trains thereon, and is not willing to do so, and,

“Whereas, said Vandalia Railroad Company is willing, in the capacity of private carrier, but not otherwise, to furnish, upon the terms and conditions hereinafter set forth, said Indian Creek Coal & Mining Company with the facilities desired by it for getting its miners to and from said coal mine;

“Now, therefore, this agreement made and entered into by and between said Vandalia Railroad Company, hereinafter designated Railroad Company, and said Indian Creek Coal & Mining Company, hereinafter designated Mining Company, witnesseth:

“1. In consideration of the premises and of the covenants and agreements hereinafter set forth to be by the Coal Company kept and performed; the Railroad Company in the capacity of a private carrier, and not otherwise, hereby covenants and agrees that it will, as soon as possible after the execution of this agreement, furnish the Coal Company a sufficient number of cars and an engine and train crew to haul and handle the same, and will run such engine and

cars as a train of the coal company between said city of Vincennes and said coal mine.

“A blue print, showing the route of said train between the points named, is hereto attached as an exhibit marked “A” and for the purpose of identification, is signed by the chief engineer of the railroad company and by the president of the coal company.

“Said cars shall be used by said coal company for the sole purpose of carrying miners employed by the coal company between the said city of Vincennes and its said coal mine.

“The Railroad Company will furnish to the coal company a sufficient number of cars to carry each working day the said miners employed at its said mine and will haul for the coal company said cars in a train, which shall leave the Union Station in said city of Vincennes in the morning of each working day and run to said mine and shall return from said mine to said Union Station in the afternoon of each working day, Provided, always, however, that said train shall not run on any day other than a working day and that said train shall not make more than one round trip each working day.

“2. In consideration of these premises the Coal Company hereby covenants and agrees to pay to the Railroad Company the sum of five hundred dollars (\$500) per month for each and every month during the continuance of this agreement, provided, always, however, that if the number of persons on said train to or from said mine on said working day during any month exceeds five hundred (500) the coal company will

pay to the Railroad Company for that month an additional sum of one dollar (\$1.00) for each person so handled in excess of five hundred, and provided further that no reduction for any cause whatever shall in any month be made from said monthly payment of five hundred dollars (\$500).

“All sums which the coal company hereby agrees to pay to the Railroad Company shall be so paid on or before the fifteenth (15th) day of each month for the preceding month.

“3. As a part of the consideration moving to the railroad company for its performance of this agreement and as an express condition thereof the coal company agrees that the railroad company shall not be liable in any event to any one for any damages claimed on account of personal injuries received by any one while being carried in said cars or while boarding said cars or alighting therefrom, nor for any death resulting from such injuries, nor from any loss of or damage to property that may be carried on said cars for said coal company, or for any of the miners riding in said cars, even though such injuries, loss or damage be caused by the negligence, gross or otherwise, of the railroad company or its employes but the coal company does not guarantee the non liability of the railroad company as above provided.

“4. This agreement may be terminated at any time by either of the parties hereto giving to the other party three months' written notice of its intention to terminate the same.”

The third paragraph of answer contains averments substantially the same as the second, and, in addition,

avers that after said contract had been entered into between appellant and the mining company, the appellee while in the employ of said mining company entered into a contract as follows:

“Miners Agreement and Release.

“In order to obtain the benefit of being carried to and from my work on a miners’ train which Indian Creek Coal and Mining Company proposes shall be run between the city of Vincennes, Indiana, and the coal mine operated by that company on the Knox County Coal Branch of the Vincennes Division of the Vandalia Railroad for the joint accommodation of the Indian Creek Coal and Mining Company, and the men employed by it at said mine, I, the undersigned, hereby agree to contribute out of my wages one dollar and fifty cents (\$1.50) per month toward the expense of running said train, to be retained by said Indian Creek Coal and Mining Company, and to assume all risk of personal injury or death, and all damage to or loss of property while riding on said train, or in boarding the same or alighting therefrom, and I hereby fully release and discharge said Coal Company and any other person, persons or corporation connected with or concerned in the running of said train from any and all liability for damages on account of my personal injury or death, or damage to or loss of property sustained while I am riding on said train or boarding the same or alighting therefrom, or resulting in any manner whatsoever from the running and operation of said train.

“Dated this 12th day of January, A. D. 1912.”

A demurrer was sustained to each of these paragraphs of answer, and these rulings are assigned as error and relied on for reversal. A motion for new trial filed by appellant was overruled, and this ruling is also assigned as error and relied on for reversal.

In answer to appellant's contention that the court erred in sustaining the demurrers to each of its affirmative paragraphs of answer, the appellee urges the several objections to such answers stated in the respective memoranda accompanying each of said demurrers.

Either of said objections, or in fact any objection, though not contained in the memoranda, which is fatal to the sufficiency of such answers, is

2. available for the purpose of justifying the ruling of the trial court, sustaining such demurrers. *Bruns v. Cope* (1914), 182 Ind. 289, 296, 105 N. E. 471, 474.

One ground upon which appellee justifies such action of the trial court is that the respective contracts upon which such answers are based are against public policy and void. The disposition of the questions presented by this ground of objection to such answers, if in accord with appellee's contention, will not only render unnecessary a consideration of the other objections, but will also, in effect, dispose of all questions presented by the appeal except possibly an objection to one of the instructions.

Back of the question suggested, two questions are primarily involved, viz.: (1) The relation which appellant sustained to appellee, whether that of a common carrier or that of a private carrier; (2) the liability of such carriers generally and the extent to

which public policy will permit a limitation of such liability.

The latter question will be first considered. "The decisions of the courts as to the right of the carrier of passengers to limit his liability for the neglect of that care and circumspection which the law requires of him have followed almost the same course as those upon the right of the carrier of goods to guard himself by contract with the bailor against the consequences of his negligence; and the same diversity as to the validity of such contracts and the extent to which they may provide against the carrier's liability, when they are allowed, is to be found." 2 Hutchinson, Carriers (3d ed.) §1072, p. 1245. It follows that many of the cases herein cited and referred to are cases which discuss and define the right of such carriers in the matter of limiting liability for injury to, or loss of, goods received by them for transportation.

Originally, at common law, a common carrier was held liable for all losses which did not fall within the excepted cases of "the act of God or of the public enemy," while the bailee or private carrier was held liable only for the losses resulting from a neglect of ordinary care. *Davidson v. Graham* (1853), 2 Ohio St. 131, 134; *Railroad Co. v. Lockwood* (1873), 17 Wall. 357, 21 L. Ed. 627, and cases there cited.

The liabilities of a common carrier may be divided into two classes: one, the liability for losses by neglect, which is the liability of a bailee or private carrier; the other, a liability for losses by accident or other unavoidable occurrence. *Steele v. Townsend* (1861), 37 Ala. 247, 79 Am. Dec. 49; *Railroad Co. v. Lockwood*, *supra*, 21 L. Ed. 635.

The only elements necessary to create liability against the common carrier, under the common law as originally declared, was the delivery of the property to the carrier by the shipper, and a failure to deliver on the part of such carrier. The reason assigned for the peculiar duty and high responsibility thus imposed on such carriers was the public character of their employment, the extensive control which they exercised over the property carried, and the facilities at their command for securing immunity for a breach of their trust. In the first half of the eighteenth century the rigidity of this rule was somewhat relaxed, by the English courts, by certain innovations sanctioned by said courts, which permitted such carriers to limit their liability by notice, even though general, if brought to the knowledge of the shipper. These innovations became so frequent, and their evil consequences so manifest, that expressions of regret from many eminent judges, both of England and America, on account of the sanction given such innovations by the courts, will be found in the cases herein cited. To correct these evils Parliament, in 1854, passed the Railway and Traffic Act, the seventh section of which provides as follows: "That every railway company, canal company, and railway and canal company shall be liable for the loss of, or any injury to, any horse, cattle or other animal, or to any article, goods or things in the receiving, forwarding or delivering thereof occasioned by the neglect or default of such company or its servants, notwithstanding any notice, conditions or declaration made and given by such company contrary thereto, and that no special contract between such parties and any other parties in the premises shall be binding upon or affect such

party, unless the same shall: (1) Be reduced to writing; (2) Be signed by the owner or person delivering the animal or goods; and (3) Be adjudged by the Court or Judge before whom any question relating thereto shall be made, to be just and reasonable."

Since the passage of this act the English courts have generally held that by special contract *the common carrier* may exonerate itself from the responsibility of insurance, but *cannot free itself "from the obligation to use due care for the safe transportation and delivery of the animal or thing to be delivered."* *Railroad Co. v. Lockwood, supra*, and cases there cited.

The courts of this country generally refused to give sanction to the doctrine, announced by the English courts, which recognized that by a *general notice*, brought to the knowledge of the shipper, the common carrier might relieve itself from liability on the theory of the *implied assent* of the owner of the goods to the terms prescribed by such carrier in such notice (*Graham & Co. v. Davis & Co.* [1854], 4 Ohio St. 362, 377, 62 Am. Dec. 285, 289); but a different conclusion was reached in cases where the shipper expressly agreed to the limitation of liability and permitted it to be made a part of his contract of shipment. In such cases the great weight of authority in this country is not substantially different from that recognized and expressed by the English courts since the passage, by Parliament, of the traffic and transportation act referred to *supra*; that is to say, the courts now generally recognize that the shipper may, if he so desires, agree to any limitation of that part of a liability *designed for his security and affecting him alone*. However, as before indicated, "the common-law ex-

ception to the common carrier's liability, which exempts only those losses arising from the act of God, was well settled to include only those inevitable causes of loss into which no human agency could have entered." This left the carrier liable as an *insurer* for many losses, equally inevitable, and which no care or prudence on his part could have prevented. No one but the owner of the goods could have any interest in this liability; and as its renunciation had no tendency to relax the vigilance which such carrier owed to others, the owner was at liberty to surrender it. But he had no power to stipulate for what was immoral in its tendency, or to take from the carrier any of the motives to the faithful discharge of his public duty, and, consequently, could not relieve him from the consequences of his own negligence or carelessness.

"There is nothing in which the public have a deeper interest, than in the careful and prudent management of public conveyances, and no higher moral obligation, than rests upon those entrusted with the control of dangerous forces, to discharge their duties with care and skill. Upon it the safety of thousands of lives, and millions of property, daily depends.

"Now, one of the strongest motives for the faithful performance of these duties, is found in the pecuniary responsibility which the carrier incurs for the failure. It induces him to furnish safe and suitable equipments, and to employ careful and competent agents. A contract, therefore, with one to relieve him from any part of this responsibility, reaches beyond the person with whom he contracts, and affects all who place their persons or property in his custody. It is immoral, because it diminishes the mo-

tives for the performance of a high moral duty; and it is against public policy, because it takes from the public a part of the security they would otherwise have." *Graham & Co. v. Davis & Co., supra; Davidson v. Graham, supra; Railroad Co. v. Lockwood, supra*, 21 L. Ed. 627, 632.

An examination of these cases and those referred to therein will show that the great weight of authority in this country, Indiana included, is to the ef-

3. fect that, whatever doubt may have once been entertained on the subject, it is now well settled that, although a common carrier cannot limit the liability which the common law devolves on him, by any general notice, he, by special contract with the shipper, may limit his liability as an insurer, and thereby exonerate himself from responsibility for losses arising from causes over which he has no control, but in so far as his special contract attempts to exonerate him from any loss to which his own fault or negligence has contributed, it will be treated as against public policy and void. *Graham & Co. v. Davis & Co., supra; Davidson v. Graham, supra; Michigan, etc., R. Co. v. Heaton* (1871), 37 Ind. 448, 10 Am. Rep. 89; *Adams Express Co. v. Fendrick* (1871), 38 Ind. 150; *Terre Haute, etc., R. Co. v. Sherwood* (1892), 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. 239; *Indianapolis, etc., R. Co. v. Forsythe* (1892), 4 Ind. App. 326, 29 N. E. 1138; *Reid v. Evansville, etc., R. Co.* (1894), 10 Ind. App. 385, 35 N. E. 703, 53 Am. St. 391.

As before indicated, the liability upon which appellee's action is predicated is alleged to have resulted from appellant's negligence. The action sounds in tort and not in contract. The liability of

an insurer is not involved. It follows that the contracts upon which said answers are based constitute no defense to appellee's cause of action, if, in fact, the appellant sustained toward the appellee, at the time of his injury, the relation of a common carrier, rather than that of a private carrier.

It is conceded by appellee that public policy is not involved in contracts of this character when entered into between a passenger and a private carrier, and that the limitation of liability here involved is legal and valid if the contract is to be construed as one between a passenger and a private carrier. In this connection see *Louisville, etc., R. Co. v. Keefer* (1896), 146 Ind. 21, 34, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. 348; *Pittsburgh, etc., R. Co. v. Mahoney* (1897), 148 Ind. 196, 200, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. 503, and cases cited; *Cleveland, etc., R. Co. v. Henry* (1907), 170 Ind. 94, 99, 100, 83 N. E. 710.

We next address our inquiry to this phase of the question. It is insisted by the appellant that the contracts under consideration, by their express terms, show that appellant contracted as a private carrier and not as a public carrier, and that the cases just cited, involving similar contracts between public carriers and express and show companies, are conclusive of the question involved, and in favor of appellant's contention that its contract is valid.

On the other hand, it is contended by appellee, in effect, that railroad companies are, in Indiana, made common carriers by statute (§5271 Burns 1914,

4. §3925 R. S. 1881; *Pennsylvania Co. v. Clark* [1891], 2 Ind. App. 146, 151, 27 N. E. 586, 28 N. E. 20) and that they cannot, by the form of their

contract, make themselves private carriers, that the instant case is not different from those involving a drover's pass, and should be controlled by those cases. *Ohio, etc., R. Co. v. Selby* (1874), 47 Ind. 471, 17 Am. Rep. 719; *Louisville, etc., R. Co. v. Faylor* (1890), 126 Ind. 126, 25 N. E. 869; *Lake Shore, etc., R. Co. v. Teeters* (1905), 166 Ind. 335, 77 N. E. 599, 5 L. R. A. (N. S.) 425; *Pittsburgh, etc., R. Co. v. Brown* (1912), 178 Ind. 11, 97 N. E. 145, 98 N. E. 625.

We first consider appellee's contention. While expressions may be found in some jurisdictions having statutes somewhat similar to our statute, *supra* (see *Walther v. Southern Pacific Co., supra*, and cases there cited) lending support to appellee's contention, and while our statute must be treated as conclusive of the character of the relation sustained by railroad companies and the public generally in the matter of the business of transportation of freight and passengers as usually carried on by, and required of, such companies under the general rules and regulations controlling them, yet we do not understand that by such statute the legislature intended that each and every carriage of passengers and goods, undertaken by such companies under special contracts, and different from that usually undertaken by, and required of such companies, should be treated as a common carriage rather than a private carriage. It may be added, also, that the facts appearing in the complaint and answers in this case are such as to distinguish it from the cases, *supra*, involving drovers' passes.

On the other hand, we cannot agree with the appellant's contention, that the common carrier may, by the words of its contract, convert itself into a private carrier, where the transportation undertaken

and the duties and responsibilities incident

5. thereto are such as are ordinarily incident to a common carrier, and we are also of the opinion that the facts appearing in this case distinguish it from the cases involving injuries to express messengers and show employes, cited *supra*.

“A common carrier may, however, undoubtedly become a private carrier or bailee for hire, when as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry”; but whether in the particular case the common carrier should be treated as private carrier, does not necessarily depend on whether a special contract was entered into for the carriage, nor upon the wording or provisions of such contract, but rather upon the nature and character of the carriage or transportation contracted for, and whether the duties and obligations flowing therefrom are those which such carrier owes to such individual contractor as a common carrier, or only those which such carrier could be required to perform as a private carrier. 1 Hutchinson, Carriers (3d ed.) §44; *Cleveland, etc., R. Co. v. Henry, supra*, 99; *Parrill v. Cleveland, etc., R. Co.* (1899), 23 Ind. App. 638, 652, 55 N. E. 1026; *Terre Haute, etc., R. Co. v. Sherwood, supra*, 134; *Railroad Co. v. Lockwood, supra*.

The business of common carriage by rail, while it contemplates the carriage of persons and property generally, yet it also contemplates that such passengers and property will be carried on trains made up by the carrier, and entirely under its supervision and control and subject to the usual and ordinary regulations governing such transportation. It is no part of the duty of a common carrier, as such, to carry

the property of shippers in their (the shippers) cars, with the shippers in charge, at such times as the shipper demands, nor are such carriers required to give to the shipper any particular car for goods to be carried with an agent of the shipper in charge.

The express messenger cases and show employee cases, cited *supra*, are cases where the shipper demanded and was given a carriage and transportation entirely different from that extended to the shipping public generally. The express company in those cases asked and obtained a combined carriage of property and the agent in charge thereof and demanded and obtained space for such carriage in a particular car, and obtained privileges in connection with such transportation which are not demanded by, or given to, the ordinary shipper.

While the express company is itself a common carrier, and owes to the public the duties of such a carrier, it cannot demand or obtain from another common carrier, transportation of its property, different from that which the other carrier owes to the shipping public generally, except by special contract for the special carriage desired. Such carriage has always been by special contract, and has likewise been recognized as private carriage rather than common carriage. *Louisville, etc., R. Co. v. Keefer, supra*, and cases cited; *Express Cases* (1885), 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 802.

So, also, with the show cases, *supra*. The transportation was a mixed transportation of property and persons, in cars owned by, and under the supervision, management and control of the show company. It is a kind of transportation which the railroad company

does not owe to, and which is not given to the public generally.

In such respects, the express messenger cases and the show employe cases are wholly different from the instant case. In the instant case, the branch

6. line of road over which the train in question was being operated when appellee was injured was appellant's own line of road. It was a branch run by it to said mines. It was used by appellant in connection with its business as a common carrier for the transportation of the product of said mines. In this connection, we suggest the query whether, by a proper proceeding before the Public Service Commission, appellant might not have been required to furnish transportation over its said branch to the workers in said mine, but whether this be so or not, we need not and do not decide. Appellant did furnish such transportation. As a common carrier operating such branch road and engaged in hauling and transporting over such branch road the products of said mines, appellant was, as such common carrier, interested in having said mines operated, and hence interested in seeing that the miners who operated such mines were provided with a means of transportation to and from their work. Under these circumstances, appellant furnished such transportation. The contract under which such transportation is furnished is not a contract for mixed transportation, or for transportation over the shipper's road, or of the shipper's employes and property in the shipper's car, or for space in a particular car, but is a contract to carry passengers only, in appellant's own cars, over its own road, operated by its own

men, for a consideration to be governed by the number of passengers carried. Appellant's business is that of a common carrier, and in the instant case it had complete, undivided and unrestricted management, control and direction of every element that entered into such transportation, including road, road-bed, cars, locomotive and all employes connected with the operation of such train, and hence it was responsible for and had the power to control and guard against every element of negligence which might expose such passengers to any danger that might be avoided by the exercise of that high degree of care, which the law in such cases imposes on the common carrier. For a court, under such circumstances, to permit such a carrier to avoid the obligations and duties of a common carrier, on the ground that in the particular instance it had contracted as a private carrier, in our judgment, would be the equivalent of the court's giving its sanction and approval to evasion.

The passengers to be carried were not in the cars of the mining company, nor were they in charge of any property of the mining company in such cars, and had nothing to do with the management or control of said cars or any property therein. Indeed, appellee, when he entered said car, was not then in the service of the mining company. His day's work at the mine began after leaving appellant's car in the morning, and ended before entering it in the evening. He entered the car as appellant's passenger, and not as the mining company's employe to take charge of its property or to perform any service for it. His relation to appellant bore no resemblance to that of one of its employes, as in the express messenger cases.

Bates v. Old Colony Railroad (1888), 147 Mass. 255, 267, 17 N. E. 633.

Transportation of himself was the only object for which appellee entered appellant's train. His employment at the mine may have made necessary the transportation, but when he entered the train he did not do so as the employe of the mining company, nor to do any service for it. Omitting any words which tend to obscure, rather than illuminate, the real character and purpose of the contract, neither it nor the transportation provided for therein contained any element not common to any transportation of passengers by a common carrier, except that such contract is for transportation between a regular station and a mine, instead of between regular stations, and the mining company acted as an intermediary for the making of the contract, and the collecting of the fares. These elements are, in our judgment, of little importance in determining whether, as to such contract, appellant should be regarded as a common carrier. They might with equal propriety be inserted in any contract for passage on excursion trains run to some point other than a passenger station and arranged for by any one other than the carrier. Mr. Hutchinson closes the paragraph of his work, from which we quoted above, with the following words: "But it may now be stated to be the decidedly prevailing doctrine in this country that *a passenger carrier cannot contract against the consequences of his own negligence when the carriage of the passenger himself is the subject of the contract.*" 2 Hutchinson, Carriers §1072, pp. 1245, 1246.

Our examination of the cases herein cited, as well as many others, confirms this statement, unless it can

- be said that the acceptance of a *gratuitous pass*
7. is a contract within the meaning of that word as above used.

Many jurisdictions, Indiana included, hold that one who accepts a gratuitous pass, accepts with its benefits its burdens also, including a release of liability for injury resulting from the carrier's negligence. *Payne v. Terre Haute, etc., R. Co.* (1901), 157 Ind. 616, 62 N. E. 472, 56 L. R. A. 472; *Indianapolis Traction, etc., Co. v. Klentchy* (1906), 167 Ind. 598, 79 N. E. 908, 10 Ann. Cas. 869; *Malott v. Weston* (1912), 51 Ind. App. 572, 98 N. E. 127; 6 Cyc 579, and cases cited under note 53.

This is the only class of cases which we have been able to find where a limitation of liability was allowed to defeat an action for injuries caused by the carrier's negligence, where the contract for carriage was with a common carrier for passenger carriage only, and the means of carriage, including road, cars, locomotive power and those operating the train, were under the complete supervision and control of such carrier. And, when we take into account the fact that the only contract upon which the passenger bases his right to be upon the train, in such a case, is gratuitous, and consider the reasoning upon which these cases are based, it is doubtful whether they can be said to constitute an exception to the doctrine, *supra*, announced by Hutchinson. There is no hardship in this doctrine, and many strong reasons unite to commend it.

That there is strong reason that such should be the holding of the courts is found in the expressions of regret of various eminent judges, before referred to in connection with the innovations permitted in the

common-law rule. Upon this subject, the
6. court, in the case of *Baker v. Brinson* (1855),
9 Rich. (S. C.) 201, 202, said: "The exacting
tendencies of certain great carriers of the present
day, enjoying facilities that almost exclude competi-
tion, admonish us, in the application of these whole-
some rules, carefully to guard against any abuses.
Notwithstanding their apparent rigor, there is a salu-
tary policy in these common-law doctrines, and those
who are called to administer the law must see to it
that they are not wholly evaded."

Again in the case of *Steele v. Townsend*, *supra*, at
page 257, the court quotes with approval from Justice
Gibson in 9 Watts (Pa.) 87, as follows: "'Though
it is, perhaps, too late to say, that a carrier may not
accept his charge in special terms, it is not too late
to say, that the policy which dictated the rule of the
common law requires that exceptions to it be strictly
interpreted, and that it is his duty to bring his case
strictly within them.'"

While these expressions of regret, in most in-
stances, seem to have been uttered in connection with
innovations of the common-law doctrine applicable
to the transportation of property, rather than of per-
sons, there would be even greater reason for regret
if innovations on the common-law rule should be per-
mitted where life and limb are involved (*Graham &
Co. v. Davis & Co.*, *supra*, 379, 380 and cases cited;
Lake Shore, etc., R. Co. v. Teeters, *supra*; *Ohio, etc.,
R. Co. v. Selby*, *supra*), and it is wholly immaterial
under what guise the innovation may appear, it is
equally to be condemned. If the courts approve con-
tracts of this character, where, as in this case, they
are made by a common carrier for passenger carriage

alone, over its own line of road, in its own cars, operated solely by its own employes, on the theory that the contract is one for private carriage, rather than for common carriage, the innovation and the evils that will result are just as real, and in no way different from what they would be if they should hold that the contract is not in violation of public policy, as expressed and recognized in the cases cited herein.

We therefore believe that the courts should refuse to give their sanction to any innovation upon said general rule which will permit a common carrier to avoid responsibility for its own negligence resulting in injury to a passenger where, as in this case, it has the exclusive supervision and control of every element of such transportation from which such negligence is possible, and where, as in this case, its contract is for passenger carriage only, regardless of the guise under which such innovation is asked or presented, and hence hold that no error resulted from the court's rulings on the demurrers to said answers.

As before indicated, this, in effect, disposes of all the questions presented by this appeal, except an objection to instruction No. 9. It is insisted

8. that under this instruction the jury was not directed to determine the damages from the evidence, but was permitted to give appellee such sum as it thought he was entitled to, regardless of the evidence.

While the instruction is open to criticism, its infirmities are not of a kind that were likely to be prejudicial or harmful, but were of that technical character contemplated by §700 Burns 1914, §658 R. S. 1881, for which a reversal is inhibited.

We might add that it appears from the record, by

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implication at least, that appellant did not regard the verdict as excessive, as no such ground appears in his motion for new trial.

Finding no error in the record, the judgment below is affirmed.

Felt, C. J., Ibach, P. J., Caldwell, Batman and Dausman, JJ., concur.

NOTE.—Reported in 114 N. E. 1001. Carriers: right of passenger carrier to stipulate against liability in consideration of reduced fare, 4 L. R. A. (N. S.) 1081; validity of stipulation in passenger limiting liability, 37 L. R. A. (N. S.) 235. See under (3) 10 C. J. 714; (5, 6) 10 C. J. 607, 714; (7) 10 C. J. 720.

KRABILL ET AL. v. KEESLER.

[No. 10,103. Filed March 22, 1918.]

1. *APPEAL.—Dismissal.—Failure to Comply with Statute.—Effect.*—A motion by appellee to dismiss an appeal because of appellant's failure in the preparation of his briefs to comply with the rules of court will be overruled if appellee has not complied with the act of 1917, Acts 1917 p. 523, concerning civil procedure. p. 264.
2. *APPEAL.—Dismissal.—Briefs.—Sufficiency.—Rules of Court.*—Under the rules of the Appellate Court, an appeal will not be dismissed for failure of appellant to comply with the rules of court in the preparation of his brief, where any question is properly presented thereby, as such presentation requires the consideration and determination of the question presented. p. 264.
3. *APPEAL.—Briefs.—Sufficiency.—Good-faith Effort.*—Where appellant's briefs manifest a good-faith effort to comply with the rules of court concerning the preparation of briefs, and where there is actually a substantial compliance therewith, and to the extent that the briefs contain enough of the record to fairly present any of the questions attempted to be presented, such question or questions will be considered and determined. p. 265.

From Steuben Circuit Court; *D. R. Best*, Special Judge.

Action between Dora L. Krabill and others and Samuel Keesler. From the judgment rendered, Dora L. Krabill and others appeal, and Samuel Keesler moves to dismiss the appeal. *Motion to dismiss overruled.*

J. E. Pomeroy and E. V. Harris, for appellant.

Hoffman & Shearer, for appellee.

HOTTEL, J.—Appellee has filed a motion to dismiss this appeal because of appellant's failure in the preparation of its briefs to comply with the rules of the court. This appeal was perfected August 18, 1917, and hence after the 1917 act concerning civil procedure (Acts 1917 p. 523, §3) became a law. It is insisted, however, that this act, in so far as it purports to control the rules of the court, is an encroachment on the inherent power of the court to provide rules for the conduct of the business before it, and that for such reason and to the extent indicated said act is unconstitutional. This suggests a question which, if properly presented and if its disposition is necessary to a determination of the motion involved, would require the case to be certified to the Supreme Court, under §1392 Burns 1914, Acts 1901 p. 565, §9.

It is conceded by appellee that he has not complied with said act of 1917, *supra*, and hence, if such act be valid, his motion to dismiss should be overruled.

On the other hand, under the interpretation

1. and construction of the rules of the court, as recognized and expressed in numerous decisions, the proper presentation of any question
2. by appellant's briefs would require the consideration and determination of such question, and hence in such case a dismissal of the appeal

would not be authorized under the law as it existed before said act of 1917. It follows that, if any question is properly presented by said briefs, there will be no occasion or necessity for the discussion or determination of the validity of the act of 1917, *supra*.

This court has frequently said in effect that where the appellant's briefs manifest a good-faith effort to comply with said rules, and where there is

3. in fact a substantial compliance therewith, they will be considered, and to the extent that they contain enough of the record to fairly present any question or questions so attempted to be presented therein, such question or questions will be considered and determined. *Harmon v. Pohle* (1913), 55 Ind. App. 439, 442, 103 N. E. 1087; *Joseph E. Lay Co. v. Mendenhall* (1913), 54 Ind. App. 342, 102 N. E. 974; *Roberts v. Ft. Wayne Gas Co.* (1907), 40 Ind. App. 528, 532, 82 N. E. 558, and cases there cited.

For the purposes of the disposition of said motion, it is not necessary that we enter into a discussion of the numerous objections made to said briefs. It is sufficient to say that such briefs are sufficient under the rules of the court to require our disposition and determination of at least some of the questions attempted to be presented therein.

For the reasons indicated, the motion to dismiss is overruled.

NOTE.—Reported in 119 N. E. 25.

BINGHAM, RECEIVER, v. NEWTOWN BANK ET AL.

[No. 9,452. Filed January 8, 1918. Rehearing denied February 19, 1918. Petition to transfer withdrawn March 25, 1918.]

1. **BILLS AND NOTES.—Certificate of Deposit.—Negotiability.**—Certificates of deposit when made in negotiable form are negotiable, and subject in general to the rules governing negotiable paper. p. 268.
2. **BILLS AND NOTES.—Certificates of Deposit.—Negotiability.—Contingencies.**—The fact that money deposited with a bank was made payable on the return of a certificate of deposit was not such a contingency as affected the negotiable character of the instrument. p. 269.
3. **BILLS AND NOTES.—Certificate of Deposit.—Negotiability.—Place of Payment.**—An instrument issued by an Indiana bank at the top of which, above the name of the bank, appeared the words, "Certificate of Deposit," certifying that a named company had deposited "in this bank" a specified sum of money, "payable to the order of self," and due on a certain date, "on the return of this certificate properly endorsed," sufficiently showed, as required by the statute existing in 1912 in order that the instrument be negotiable that it was payable at an Indiana bank, and it was negotiable as an inland bill of exchange. p. 269.
4. **BILLS AND NOTES.—Certificate of Deposit.—Pleading.—Holder in Good Faith.**—That plaintiff was a purchaser in good faith of a certificate of deposit, negotiable as an inland bill of exchange, before maturity, for value and without notice of any defenses or claims in due course, was a sufficient reply to an answer alleging that the certificate was negotiable without the authority of the payee. p. 270.

From Fountain Circuit Court; *Isaac E. Schoonover*, Judge.

Action by James Bingham, receiver of the Columbia Casualty Company, against the Newtown Bank, in which one Rudolph C. Keller intervened. From a judgment for the intervener, Keller appeals. *Affirmed.*

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Bingham & Bingham and Charles M. McCabe, for appellant.

C. W. Dice, Adams, Follansbee, Hawley & Shorey, Clyde E. Shorey and John E. Gavin, for appellees.

IBACH, C. J.—Appellant brought this action against the Newtown Bank to recover upon a certificate of deposit as follows:

“Certificate of Deposit.

“Newtown Bank \$245.00

“Newtown, Indiana, October 2, 1912.

“This certifies that Columbia Casualty Company has deposited in this bank two hundred and forty-five and no/100 dollars, payable to the order of self, due August 5, 1913, on the return of this certificate properly endorsed.

“T. C. Shultz, Cashier.”

Rudolph C. Keller was admitted as a party defendant upon his intervening petition, and he filed a cross-complaint claiming to be the owner of the certificate. Various issues were joined on the complaint and on the cross-complaint. On trial of the issues the court found that Keller was the owner of said certificate of deposit and that neither appellant nor the Newtown Bank had any interest therein; that he should have judgment against the bank for \$271.53, and there was judgment accordingly.

The errors assigned and relied on for reversal are the overruling of appellant's demurrer to the second paragraph of reply of appellee Keller to the second and third paragraphs of appellant's answer to the cross-complaint of said Keller, and the overruling of appellant's motion for a new trial.

The first assigned error raises the question of the negotiability of the instrument sued on. Appellant very earnestly contends that such instrument is non-negotiable under the law merchant. It is claimed that it is not negotiable as an inland bill of exchange, as it "was not by its terms payable in a bank of Indiana," and that the words "on return of this certificate properly endorsed" do not fix the place of payment of said certificate and are mere surplusage, otherwise the time would be rendered indefinite and it would not be negotiable on account of such indefiniteness of time of payment. On the other hand, appellee contends that the instrument is negotiable; that it definitely names the time of payment, and there is no condition of uncertainty as to the obligation imposed upon the maker to pay the sum due; that the paper was issued by a bank in this state and it cannot be doubted that Indiana banks have a regular and established place of business, and that the regular and established place of business of the Newtown Bank is located, as the instrument states, at Newtown, Indiana.

The decided weight of authority is that a certificate of deposit when made in negotiable form is negotiable, and subject in general to the rules of

1. negotiable paper. *Krieg v. Palmer Nat. Bank* (1912), 51 Ind. App. 34, 38, 95 N. E. 613; *Miller v. Austen* (1851), 13 How. 217, 14 L. Ed. 119; *Hatch v. First Nat. Bank, etc.* (1900), 94 Me. 348, 47 Atl. 908, 80 Am. St. 401; *Birch v. Fisher* (1883), 51 Mich. 36, 16 N. W. 220; *Matter of Baldwin* (1902), 170 N. Y. 156, 63 N. E. 62, 58 L. R. A. 122; *Johnson v. Henderson* (1877), 76 N. C. 227; *Bellows Falls Bank v. Rut-*

land Co. Bank (1867), 40 Vt. 377; 7 Cyc 535; 5 Am. and Eng. Ency. Law (2d ed.) 805.

The fact that the money deposited with the bank was made payable on return of the certificate was not such a contingency as affected the negotiable

2. character of the instrument. *Citizens' Nat.*

Bank v. Brown (1887), 45 Ohio St. 39, 42, 11 N. E. 799, 4 Am. St. 526; *Hunt v. Divine* (1865), 37 Ill. 137; *Smilie v. Stevens* (1866), 39 Vt. 315; *Bellows Falls Bank v. Rutland Co. Bank, supra*; *Kirkwood v. First Nat. Bank, etc.* (1894), 40 Neb. 484, 58 N. W. 1016, 24 L. R. A. 444, 42 Am. St. 683; *Cassidy v. First Nat. Bank, etc.* (1882), 30 Minn. 86, 14 N. W. 363.

In answer to the claim that said certificate was not by its terms payable in a bank of Indiana, while we recognize that by virtue of the statute

3. as it existed at the time this certificate was issued it was required of promissory notes in order that they be negotiable as inland bills of exchange that they be by their terms payable in a bank of Indiana, yet we are of the opinion that by the terms of the instrument in suit it is brought within the statute as it then existed. It is apparent from the face of the certificate that it is the obligation of the Newtown Bank of Newtown, Indiana; that it was issued for money deposited in "this bank" and is payable "upon return of the certificate properly endorsed." In *Sanbourn v. Smith* (1876), 44 Iowa 152, it was held that a certificate of deposit made payable "on return of the certificate" is payable at the place where the bank is located. See, also, *Krieg v. Palmer Nat. Bank, supra*.

Having determined that the certificate of deposit sued on is negotiable as an inland bill of exchange

it follows that the facts set up in appellee's reply, viz., that he was a purchaser in good faith,

4. before maturity, for value and without notice of any defenses or claims in due course, was a sufficient answer to the defense alleged by appellant that the certificate was negotiated without the authority of the payee. The court did not err in overruling the demurrer to said reply.

Since the filing of appellant's brief in this case the cross-complaint filed by appellee Keller was brought into the record by *certiorari* and the points under the motion for new trial made upon the theory that no cross-complaint was filed are admitted to have no bearing and will not be considered.

Other points raised under such motion would require a consideration of the evidence which is not before us, and therefore cannot be considered.

No reversible error being shown, the judgment of the trial court is affirmed. Judgment affirmed.

NOTE.—Reported in 118 N. E. 318.

POLAR ICE AND FUEL COMPANY ET AL. v. MULRAY.

[No. 10,176. Filed April 2, 1918.]

1. MASTER AND SERVANT.—*Workmen's Compensation Act.—Right to Compensation.—Injury Due to Felonious Act.*—A claim for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, will not be denied merely because the accident resulting in the injury occurred by reason of the unlawful and felonious act of some third person, if the employe actually sustained it as a result of being specially and peculiarly exposed by the character and nature of his employment to the risk of the danger which befell him. p. 273.
2. MASTER AND SERVANT.—*Workmen's Compensation Act.—Inju-*

Polar Ice, etc., Co. v. Mulray—67 Ind. App. 270.

ries.—Arising Out of Employment.—Assault by Fellow Servant.—Where it was the duty of a servant to keep a record of the ice taken from the master's ice house by its drivers and to collect from them for shortage in their settlements, and the servant was shot and killed by a driver as a result of a quarrel over a collection, his death arose out of the employment. (*Union Sanitary Mfg. Co. v. Davis* [1916], 64 Ind. App. 227, distinguished.) p. 273.

3. MASTER AND SERVANT.—*Workmen's Compensation Act—Appeal.—Review.—Evidence.—Sufficiency.*—Where the inference that a servant's death resulted from an accident arising out of the employment was a conclusion reasonably deducible from the facts, such finding by the Industrial Board must be upheld, although other inferences might have been drawn from the evidence. p. 275.

From the Industrial Board of Indiana.

Proceedings for compensation under the Workmen's Compensation Act by Bessie Mulray against the Polar Ice and Fuel Company and another. From an award for applicant, the defendant appeals. *Affirmed.*

McKay & Merrell, for appellant.

Ralph M. Spaan, for appellee.

IBACH, C. J.—While appellee's husband was at work at the plant of appellant another employe shot and killed him. Appellee filed her claim for compensation before the Industrial Board under the Workmen's Compensation Act (Acts 1915 p. 392) and compensation was allowed.

The only claim made by appellant is that the evidence does not sustain the finding of the Industrial Board that the accident arose out of decedent's employment. The uncontroverted facts are substantially the following: John Mulray, decedent, was employed by appellant to keep a record of ice taken from its ice plant to be sold by its drivers, and to require each to account for the quantity taken out by

him when he returned after delivering each load. If there was any shortage it was Mulray's duty to collect the amount of the shortage in cash, and if not collected he then reported it to another bookkeeper, who charged the amount of the shortage against the delinquent driver, and the amount was deducted from his pay. Spencer, the man who shot Mulray, was one of the drivers, and some days before the shooting Mulray had discovered that Spencer was short, and his attention was called repeatedly to it and a settlement requested by Mulray. On these occasions Spencer would become enraged and accuse Mulray of failing to keep his account accurately, and for some time prior to the fatal shooting he seemed to hold much enmity toward Mulray. On the day of the shooting he (Spencer) had been arguing the matter with the bookkeeper, and as he left her he said: "Yes and I will fix John (meaning Mulray) too." He then went to the paymaster and argued with him about the pay which he had been given, and from there went to decedent, who was in the "scale office," and there created much disturbance, and sought to do Mulray harm. He there said to him, "You come out and I will fix you." He also called Mulray a son of a b—— and Mulray said two or three times, "You call me a son of a b——," and then Spencer said again, "You come out and I fix you." Mulray then said: "If you don't get out I will shoot you down," and went to a drawer under the scale and took out a revolver. When Spencer saw it he ran out the door, Mulray following, and as soon as he got out he fired two or three shots. He then returned, saying something about running Spencer up the railroad track. He took out the empty shells, reloaded the revolver, and replaced it. It was one used by the nightwatch-

man. Spencer went down on Virginia avenue and bought a second-hand revolver, and about one hour later came back to appellant's plant and shot Mulray as he was seated at his desk in the office. There is also some evidence showing that some of appellant's drivers were rough men, and particularly so on Saturday, pay day, when they generally drank liquor. This was particularly true of Spencer, with whom there had been considerable trouble about other conduct on his part, and he had manifested a malicious disposition.

It is conceded by appellant that Mulray's death was the result of an accident received in the course of his employment with it, but the contention is that it did not arise out of such employment.

The rule is well established that a claim for compensation will not be denied simply because the accident occurred by reason of the unlawful and

1. felonious act of some third person, if the employe actually sustained it by being specially and peculiarly exposed by the character and nature of his employment to the risk of the danger which befell him. In other words, when the injury results from the conditions surrounding an employe at the time of the accident and under which he was required to perform his duties, then generally speaking, it arises out of the employment. *Union Sanitary Mfg. Co. v. Davis* (1916), 64 Ind. App. 227, 115 N. E. 676.

The facts here show that decedent was performing a character of service for his employer which might at any time cause some personal grievance

2. against him on the part of other employes with whom his duties required him to come in daily contact, so that when they were so angered at him,

or when under the influence of liquor they were liable to do him harm, still he was required to remain at his place of employment, surrounded by these dangers which finally led to and produced his death. Under such circumstances it may very properly be said that the accident which did occur was a risk reasonably incident to decedent's employment.

Appellant relies principally upon the case of *Union Sanitary Mfg. Co. v. Davis, supra*, in which this court stated the same rule which has been declared by the several courts considering like questions. The facts of that case are clearly distinguishable from the present. There the claimant on his own account provoked a quarrel with another employe in another department and with whom his employment did not require him to be associated or to come in contact, nor to whom he was required to go with any complaints, and it was made to appear that there was no causal connection between Davis' duties and his injuries. There are other distinguishing features, but this is sufficient. As bearing on some of the propositions now under consideration, the authorities cited in that case, however, are instructive. See, also, *United Paperboard Co. v. Lewis* (1917), 65 Ind. App. 356, 117 N. E. 276; *In re Loper* (1917), 64 Ind. App. 571, 116 N. E. 324.

In the case last cited this court said: "The test of the right to compensation under such acts, in so far as concerns the element now under consideration, is whether the injury resulted from some peril incident to the employment; whether the cause of the injury, although not foreseen, may reasonably be deduced from the circumstances and surroundings peculiar to the place, and under which the workman

was required to perform his labors, regardless of whether such perils or surroundings involve negligence on the part of the employer.”

The evidence also shows that Mulray was a peaceable man, entertaining no ill will against Spencer, while the latter was of a quarrelsome disposition, and for at least ten days before the shooting occurred, as heretofore disclosed by the evidence, had made threats against decedent to do him harm, both to him personally and to others. One witness stated: “Whenever decedent called his attention to any shortage he got mad and sought a personal encounter with him (Mulray).” Yet it was decedent’s express duty to deal with all these drivers daily and about a subject which might and did often awaken in them a spirit not only of resentment, but of actual antagonism, because it affected a matter of deep interest to them—their pay. In this particular instance it is quite reasonable to infer that the shooting occurred by reason of decedent’s persistent endeavor to collect shortages due his employer, and this is particularly true when considered in connection with the character of the man, as shown by the record, who did the shooting.

While it may be said that the inference that the unfortunate accident in the case was the result of a risk reasonably incident to Mulray’s employment, and therefore arose out of his employment, is not the only inference which might be drawn from the evidence, yet it is a very reasonable one, and since the Industrial Board has so concluded, we are required to uphold the award.

Award affirmed.

NOTE.—Reported in 119 N. E. 149. Workmen’s compensation: injuries deemed to arise out of and in the course of the employment, see note 191.

HOME STOVE COMPANY v. BISHOP ET AL.

[No. 10,124. Filed April 3, 1918.]

EXCEPTIONS, BILLS OF.—*Filing.—Extension of Time.*—An extension of time beyond the term in which to file a bill of exceptions containing the evidence must be granted when the motion for a new trial is overruled in order to make the evidence part of the record.

From Marion Superior Court (102,279); *Theophilus J. Moll*, Judge.

Action by Sarah J. Bishop and others against the Home Stove Company. From a judgment for plaintiffs, the defendant appeals. *Appeal dismissed.*

Delos A. Alig, for appellant.

Thomas D. McGee, for appellees.

IBACH, C. J.—Appellee Sarah J. Bishop has filed a motion to dismiss this appeal, alleging several grounds therefor. Upon such motion we are required to determine whether or not any question is presented for our consideration on the merits of the appeal. The only error assigned is the overruling of appellant's motion for a new trial. A consideration of any of the reasons set forth in said motion would require an examination of the evidence.

It is contended in the motion to dismiss that the evidence is not in the record. The record shows that the judgment was rendered on January 17, 1917; that on February 2, 1917, a motion for new trial was filed, which motion was overruled on March 8, 1917. The record of the proceedings had on the latter date shows the ruling on the motion and an exception to such ruling, but it fails to show that any time was granted by the court within which to file the bill of

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exceptions containing the evidence. No further proceedings are shown by the record until on September 4, 1917, when a purported bill of exceptions was filed.

It has been held that an extension of time beyond the term in which to file a bill of exceptions must be granted when the motion for a new trial is overruled. It follows that the evidence is not in the record. *Wilson v. Kester* (1915), 59 Ind. App. 471, 109 N. E. 744, and cases cited.

Appeal dismissed.

NOTE.—Reported in 119 N. E. 152.

GEORGIA LIFE INSURANCE COMPANY ET AL. v. OTTER CREEK COAL COMPANY.

[No. 9,484. Filed April 3, 1918.]

1. PRINCIPAL AND AGENT.—*Continuance of Agency.—Presumption.—Liability of Principal.*—A general agency once established is presumed in law to continue, and one dealing with such person as the agent of his principal, in good faith, is not affected by the revocation of the agent's authority, unless notice is given thereof. p. 280.
2. INSURANCE.—*Employer's Liability Insurance.—Notice of Accident.—Compliance with Policy Provisions.*—A provision of an employer's liability policy requiring written notice to the insurer or its agent of any claim made on account of accident, is complied with by insured's sending all notices and summons to the general agent who wrote the policy and who sent such notice to the insurer, where insured had received no notice of the revocation of the agent's authority. p. 280.
3. PRINCIPAL AND AGENT.—*Revocation of Agency.—Necessity of Notice.*—Notice of the revocation of an agency need not be in any particular form and need not be communicated in any particular manner, but to be effective it must be clear and unequivocal. p. 281.

From Vigo Superior Court; *Fred W. Beal*, Judge.

Georgia Life Ins. Co. v. Otter Creek Coal Co.—67 Ind. App. 277.

Action by the Otter Creek Coal Company against the Georgia Life Insurance Company and another. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Royse, Dix & Cooper, for appellants.

G. S. Payne, for appellee.

DAUSMAN, J.—Appellee instituted this action against appellants, Georgia Life Insurance Company and Georgia Casualty Company, to recover on an employers' liability policy. Verdict and judgment for appellee in the sum of \$2,263.55.

On December 14, 1911, the Georgia Life Insurance Company issued its policy to appellee, by which it agreed "to indemnify the assured against loss arising or resulting from claims upon the assured for damages on account of bodily injury accidentally suffered, or alleged to have been suffered, while this policy is in force * * * by any employe of the assured," and also to defend the assured against said claims, and pay expenses and costs of litigation. Subsequently said life insurance company changed its name to Georgia Casualty Company. The policy was issued through George M. Cobb and Company, appellant's general agent for the State of Indiana.

On July 6, 1912, one Jeff Knott, while employed by appellee as a workman in its coal mine, received an injury by accident. Knott made claim upon appellee for compensation by way of damages. Appellee referred this claim to Cobb and Company. The casualty company refused to recognize liability under the policy. On April 17, 1913, Knott brought suit on his claim against appellee. Two days thereafter appellee sent notice of the suit, together with the sum-

mons therein issued, to Cobb and Company. The casualty company refused to defend. Appellee made defense. Trial resulted in verdict and judgment for Knott. This action is to recover the amount paid by appellee on the Knott judgment, together with expenses incurred in making the defense.

The real trouble grows out of the inexcusably careless method of transacting business which prevailed between the casualty company and its said agent. Cobb and Company formally resigned as agent for the casualty company in the latter part of April or the first part of May, 1912. But, notwithstanding this resignation, Cobb and Company continued to receive monthly payments of premium on said policy from appellee, the last of which payments was made on July 25, 1912, and continued to transact business in a general way for the casualty company by receiving and transmitting premiums and reports of accidents and notices of claims, by cancelling policies, and in other ways, until December, 1912. This character of service was rendered under the direction of one Mr. Eps, manager and superintendent of agencies for the casualty company. It would be useless to relate what Cobb and Company did with appellee's communications concerning the Knott claims, for it appears from the evidence that Cobb and Company transmitted direct to the casualty company, on October 18, 1912, notice of said claim, and the casualty company had ample time and opportunity to defend against said claim, if it had cared to do so.

Appellant's main contention is that appellee did not comply with the following provisions of the policy:

“When any accident occurs, the assured shall

give immediate written notice thereof to the company at its home office in Macon, Georgia, or to its duly authorized agent. If any claim is made on account of such accident, the assured shall give like notice thereof.”

The only questions presented for review arise out of the giving of certain instructions; and the entire controversy as to the law of the case may be

1. fully and fairly settled by determining the merits of the following instruction: “No. 9. The court instructs you that a general agency once established is presumed in law to continue, and one who deals with such persons as the agent of his principal, in good faith, is not affected by the revocation of the agent’s authority to act as agent, unless notice is given such third person of the revocation of such agency. So in this case, if you find the Otter Creek Coal Company obtained the policy in suit
2. through George M. Cobb and Company, and you further find that George M. Cobb and Company, at the time said policy was issued, if any was issued, was the general agent of the Georgia Life Insurance Company, now the Georgia Casualty Company; and that the Otter Creek Coal Company sent all notices and summons to the general agent of the defendants; and that such agent received the same and forwarded the same to the defendant’s general counsel; and that the defendant made no objection to such service of said agent, then the defendant would be bound by the acts of such person or persons, acting as such agents, unless you find that the insured had notice of the revocation of the agent’s authority to act.

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The instruction correctly states the law. *Springfield Engine, etc., Co. v. Kennedy* (1893), 7 Ind. App. 502, 34 N. E. 856. Of course, notice of the revo-

3. cation of an agency need not be in any particular form and need not be communicated in any particular manner; but to be effective it must be clear and unequivocal. *Mechem, Agency* §623 *et seq.* In the case at bar there is no evidence tending in the slightest degree to prove that appellee had notice, actual or constructive, of the revocation of Cobb and Company's agency.

All other objections to the instructions may be put aside as being without merit. Judgment affirmed.

NOTE.—Reported in 119 N. E. 151. See under (1) 31 Cyc 1305, 1639, 2 C. J. 539, 920; (2) 31 Cyc 1306, 2 C. J. 541; (3) 1 C. J. 471.

CHICAGO AND ERIE RAILROAD COMPANY v. HOFFMAN
ET AL.

[No. 9,543. Filed April 4, 1918.]

1. EMINENT DOMAIN.—*Taking Railroad Right of Way.—Compensation.—Future Damages.*—The purchase of a railroad company from the owner of an additional right of way to be used in building a second track did not settle or adjust future damages from increased drainage on the grantor's land resulting from the construction of such track, where at the time of the purchase the grantor did not know and could not reasonably have anticipated that the contemplated improvements would cause the diversion of drainage complained of; the rule being that the price paid for a railroad right of way settles future damages applying only to damages which might reasonably be expected to result from the conveyance and the construction and maintenance of the road in a proper and lawful manner. p. 289.
2. EMINENT DOMAIN.—*Right of Way Dividing Farm into Separate*

Chicago, etc., *R. Co. v. Hoffman*—67 Ind. App. 281.

Tracts.—Condemnation Proceedings.—Measure of Damages.—Where a farm located on both sides of a railroad right of way was owned and operated as one farm by the owner prior to and at the time of a condemnation proceeding by a railroad to appropriate additional land for drainage purposes under §929 *et seq.* Burns 1914, Acts 1905 p. 59, the measure of damages was the difference in the value of the entire tract before and after the change in drainage; and such rule for the determination of damages was not affected by the fact that the owner purchased part of the land from the railroad with knowledge that it was double tracking its road, which improvement necessitated the appropriation of land involved for drainage purposes. p. 290.

3. *EMINENT DOMAIN.—Right of Way Dividing Farms into Separate Tracts.—Jury Question.*—In a condemnation proceeding by a railroad to appropriate additional land on which to build a second track, whether a farm, which was on both sides of the right of way and consisted of contiguous tracts, was held and operated as separate units or as a single farm was a question of fact for the jury. p. 290.

4. *EMINENT DOMAIN.—Damages.*—Where defendant's 178-acre farm, which was divided into separate tracts by a railroad right of way, was operated by him as one farm, and the increased flow of drainage water onto one tract, because of changes in the railroad grade, depreciated the value of the land from about \$90 to about \$85 an acre, damages of \$300, awarded in proceedings by the railroad to condemn land for drainage purposes were not excessive. p. 294.

From Fulton Circuit Court; *Smith N. Stevens*, Judge.

Action by the Chicago and Erie Railroad Company against Charles H. Hoffman and another. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

W. O. Johnson and Holman, Bernetha & Bryant, for appellant.

R. R. Carr and C. C. Campbell, for appellees.

FELT, J.—This is a proceeding by appellant against appellees to condemn real estate for drainage purposes in pursuance of §929 *et seq.* Burns 1914, Acts

1905 p. 59. The error assigned is the overruling of appellant's motion for a new trial.

Appellee Charles H. Hoffman owned the land sought to be appropriated, and Carrie N. Hoffman is his wife. Omitting formal averments, the complaint in substance shows: That appellant sought to condemn and appropriate certain real estate owned by Charles H. Hoffman, for its use as an easement. "That said company intends to use said real estate for the right of way of its railroad, roadbed and tracks, including side tracks and switches, turnouts and water stations, materials for construction purposes sufficient to enable the plaintiff to construct and repair its railroad, and for making proper drains for its said right of way and roadbed. That the plaintiff and defendant were unable to agree for the purchase of said land, or an interest therein, or other property or right. That for the past two years said company has been engaged in building a second track of railroad upon its right of way through Fulton county, and other counties in this state, and over and upon the lands of the defendant. That in the construction of its second track, deep excavations were often required to be made and heavy fills required at other places in order to establish a uniform grade, or what is known as a reduced grade, which became necessary for the efficiency of said railroad and for the operation thereof; that in consequence thereof the drainage of the right of way was changed to the extent that the drainage along the single track became wholly insufficient in carrying off the water from the right of way precipitated in large quantities during heavy rains on said right of way; that in order to meet the new conditions arising from the improve-

ment of its railroad and the building of its drainage over and through defendants' land, not only to protect said right of way and improvements, but all abutting landowners, that a change and enlargement of the system of drainage is imperative and necessary to the safety and usefulness of said railroad as well as for the benefit of the defendant and other adjacent landowners, to have a right of way over defendants' land to enable said company to construct and repair its road and a right to conduct the water, and the right of making proper drains."

The complaint further shows the existence of two public ditches, duly established; that one of them is known as the Spera ditch, and the other as the Harsh ditch, the latter being the outlet of the former; that appellant was assessed benefits on the Spera ditch, which begins north of the company's right of way, crosses under its tracks, and empties into the Harsh ditch at the south line of the public highway running east and west and upon the lands of said Hoffman; that appellant is enlarging the Spera ditch to carry off additional water accumulated as the result of double tracking and reducing the grade of appellant's road which crosses the Spera ditch; that the specific purpose of this appropriation is to provide a more efficient outlet for said drainage on the lands of defendants, not to destroy the Harsh ditch, but to clean out and enlarge the same to sufficient capacity to carry off the water emptied into it from the Spera ditch, "and to create an easement thereon so that said company can effectually maintain necessary drainage for the protection of its right of way and the operation of its railroad"; that an ineffectual effort to reach an agreement with appellees as to the damages, if any

occasioned by the proposed appropriation had been made; that the property to be condemned has been duly surveyed and located as shown by "Exhibit A" filed with the complaint.

Appraisers were duly appointed, who reported that there was no value to the real estate to be appropriated, and that no damages resulted to the residue of appellee's land, by reason of the appropriation. Appellees excepted to the report so made and alleged that they were damaged by the appropriation in the sum of \$2,000. A trial by jury resulted in a verdict for appellees in the sum of \$600. Appellant's motion for a new trial was overruled.

A new trial was asked on the ground that the court erred in the admission of certain evidence and in the giving and refusal of certain instructions; that the assessment of the amount of recovery is erroneous, being too large; that the verdict is not sustained by sufficient evidence, and is contrary to law.

Without substantial conflict in the evidence, it appears that at the time this proceeding was instituted, appellee Charles H. Hoffman owned 178 acres of real estate in Fulton county, Indiana, 115 acres of which lay north, and 63 acres south, of appellant's railroad. Long prior to filing its instrument of appropriation in this case, appellant purchased from appellees the right of way for its double-track road off of the 115 acres aforesaid, and appellee purchased from appellant twenty-three acres of real estate south of the railroad. Appellee also owns about forty acres south of the railroad right of way, through which the Harsh ditch runs. The original line of single track railroad was built in 1881 and the right of way for double tracking the road was procured in 1912 and 1913, at

which time appellant purchased from appellee three or four acres north of and adjoining its tracks. Appellant also acquired a tract of land from other parties south of its road and subsequently conveyed a part of it to appellee, the same being the twenty-three acres aforesaid; but for the railroad appellee's land would be contiguous. He operates it as one farm.

There is also evidence tending to prove that about six months after appellee had purchased the twenty-three acres, and some two years after appellant acquired three or four acres from appellee for right of way as aforesaid, appellant instituted this proceeding to provide additional drainage which it found to be necessary; that the changes appellant was making in its road, besides double tracking, involved cutting down a very high grade for a distance of about two miles and lowering it from twenty to thirty-two feet. The change in grade resulted in a change in the flow of surface water, the collection of water from a highway, for about eighty rods of its length and the collection of water from fifty to eighty acres of real estate, that formerly, and naturally, flowed in the opposite direction to other and different outlets, and the flowing of such waters along appellant's right of way and turning the same upon appellee's land. By such changes in grade and ditches, appellant brought large quantities of additional waters so gathered and accumulated as aforesaid, along and across its right of way, down steep grades to a point opposite the lowest part of appellee's land, where it made an opening through its embankment, placed large tile therein, and discharged the water with increased concentration and greater force, and thereby caused the same to flood appellees' land after every hard rain.

The evidence also tends to show that appellee had sufficient outlet for the drainage of his land through the original Harsh ditch, and that after he purchased the twenty-three acres from appellant, he had drained it; that several tile ditches on his land emptied into the Harsh ditch, and after the changes aforesaid, and the enlargement of the Harsh ditch, dirt was washed into it by the increased quantity and flow of water, and it was filled up so as to cover the outlets for the tile drains of appellee aforesaid; that the enlarged ditch was made sixteen or eighteen feet wide but was not deepened; that about six acres of appellees' land frequently overflowed and was rendered unfit for cultivation, after the new ditch was constructed, and the increased flow of water was turned into the channel; that it had not overflowed prior thereto except on one occasion of an exceptional rainfall; that the land was worth about \$90 per acre before the change in the drainage and about \$85 per acre after the new system was constructed and in operation.

The deeds for the right of way to the railroad are not in evidence, and there is nothing to show that in acquiring the right of way for the double-track road, the grantors were informed, or knew, that the grade was to be lowered as above indicated, or that the improvements contemplated would in any material sense change the direction of the flow of water or increase the volume or velocity of water discharged upon appellee's land. Appellee testified that appellant simply bought from him three or four acres along and adjoining its right of way on the north, to be used in laying its double track, and "that is all that was said about it."

Witnesses were permitted to testify to the fair mar-

ket value of the 178 acres, considered together as one farm, both before and subsequent to the appropriation for drainage purposes, and the construction of the enlarged ditch.

Appellant objected for the reason that the twenty-three acres were purchased by appellee from appellant after it had begun double tracking its road, which fact was known to him, and he took the land subject to the right of the company to make the improvement, and any damages resulting therefrom were included in the purchase price; that the 178 acres is not shown to be contiguous and to constitute one farm; that appellant seeks only an easement across thirty-eight acres south of the railroad, and the damages recoverable would be limited to the land through which the easement is acquired. The objection was overruled by the court and appellant reserved an exception.

Appellees knew when they acquired title to the twenty-three acres south of the railroad that appellant was proposing to double track its road, for they had previously executed a conveyance of a right of way for that purpose, but there is nothing to show that appellees had any special knowledge of the change in the grade, the effect upon drainage or existing ditches, or that there were any special agreements between the parties relating to any of such questions.

The evidence tends to show that appellees' buildings were north of the railroad, and that after he acquired title to the twenty-three acres from appellant he operated the entire 178 acres as one farm, and that he so owned and operated it prior to the institution of the proceedings involved in its appeal; that the 178 acres were contiguous except as affected by the railroad. Therefore, for the purposes of the question

presented, the situation is not different from what it would have been had appellant acquired its railroad right of way through appellees' land by appropriation proceedings under the statute without any special agreement or limitations in regard thereto, other than the fact that the right of way so procured was to be used in double tracking its road. *Roushlan v. Chicago, etc., R. Co.* (1888), 115 Ind. 106, 17 N. E. 198.

Appellant does not contend that the owner of the land appropriated for drainage purposes is precluded from having the question of his damages, if any, determined in this proceeding, because of the fact that appellant had previously acquired a right of way through appellees' land for its double-track road, but it contends that the error complained of is shown by the fact that appellee had already been paid for such drainage easement in so far as the twenty-three acres are involved, and that only the thirty-eight acres south of the railroad through which the enlarged ditch runs, should be considered in determining the damages in this case.

The general rule is that the price paid for a railroad right of way, or the damage assessed in condemnation proceedings for such purpose, settle

1. and adjust, once for all, both present and future damages of every kind and character which might reasonably be expected to result from such appropriation or conveyance, and the construction and maintenance of the road in a proper and lawful manner. But it does not follow from this rule that the damages resulting from the drainage contemplated by this proceeding were settled and adjusted by the transaction in which appellee acquired from appellant title to the twenty-three acres aforesaid.

There is nothing to indicate that such drainage was contemplated at that time, and it cannot be held, as against appellee, on the facts of this case, that the damages resulting to his land by the change in the drainage system, as heretofore indicated, could reasonably have been expected to result from the double tracking of appellant's road. *Cleveland, etc., R. Co. v. Griswold* (1912), 51 Ind. App. 497, 502, 97 N. E. 1030; *Cleveland, etc., R. Co. v. Hadley* (1912), 179 Ind. 429, 439, 441, 101 N. E. 473, 45 L. R. A. (N. S.) 796; *Cleveland, etc., R. Co. v. Smith* (1911), 177 Ind. 524, 543, 546, 97 N. E. 164; *Roushlonge v. Chicago, etc., R. Co., supra*.

As already indicated, the evidence tended to show that the tracts comprising the 178 acres were owned and managed as a single farm by appellee

2. prior to and at the time this proceeding was instituted. Such being the case, the court did not err in receiving evidence as to the value of the farm in its entirety, both prior and subsequently to the appropriation and establishment of the enlarged ditch and the change in the drainage system. *Cleveland, etc., R. Co. v. Smith, supra*; *Chicago, etc., R. Co. v. Huncheon* (1892), 130 Ind. 529, 533, 30 N. E. 636.

Whether a farm consisting of contiguous tracts is held and operated as separate units, or as a single farm, is a question of fact to be determined

3. like any other such question from the evidence in the case. *Cleveland, etc., R. Co. v. Smith, supra*.

The court in this case by its instructions submitted the question to the jury as one of fact to be determined from the evidence, and, in instructing as to the measure of damages, informed the jury that if they

found from the evidence that the 178 acres consisted of parts that were contiguous, and that appellees used such tracts as one farm, then they would be authorized to assess damages to the farm as a whole by reason of the appropriation and improvement set out in the complaint. Also, that if they did not so find, but found that a part only of such farm was damaged by the proposed improvement, they should assess damages, if any, only on the part so affected. Also, that the measure of damages was the difference, if any, in the fair cash value of the land so affected just before and after the change in the drainage system aforesaid.

At the request of appellant the court also instructed the jury that, if the fair market value of appellee's land was as much after as before the improvement was made, appellee could not recover, and the verdict should be for appellant.

The appellant also claims that the court erred in its instructions and gave the jury an erroneous idea of the proceeding, and especially as to the easement or right appellant sought to establish. Also, that the damages were not properly limited and included as an element the effect upon defendant's farm, as a whole, caused by such improvement and drainage, and not merely that caused by the additional water, if any, turned upon appellant's land by the improvement, which had not previously flowed into the Harsh ditch.

The instructions seem to present the case fairly and fully as to all the parties. The court gave a number of instructions requested by appellant, and among them the following:

"No. 2. The court instructs you that if you find

from the evidence that the Chicago & Erie Railroad Company purchased of Sylvester Churchill and Charles E. Stephey tracts of land adjoining plaintiff's right of way for right of way purposes and sold to Charles Hoffman so much of said real estate so purchased of said Churchill and Stephey as remained after the strips needed for the construction of plaintiff's double track was taken out and said Charles H. Hoffman purchased said Churchill and Stephey land with knowledge that said double track was to be constructed on said strips purchased of Churchill and Stephey, then said Hoffman could not recover any damages which resulted or might reasonably result from the proper construction of the Chicago & Erie Railroad Company's double track thereon. * * *

"No. 3. The court instructs you that under this proceeding the only interest the Chicago & Erie Railroad Company can acquire in the ditch running over and across the defendant, Hoffman's, land is a mere easement; said Hoffman remains the owner of the land and subject to the use of said drain by the plaintiff, said Hoffman may make all lawful use of his land and said defendant, Charles Hoffman, would not be entitled to recover in this action as damages for land taken, the value of any land, as no land is taken by the plaintiff. * * *

"No. 4. The plaintiff, Chicago & Erie Railroad Company, would not be liable to defendant, Hoffman, for any injury or damage to him from water that naturally flowed into the Spera Ditch, or Harsh Ditch, constructed by order of court, off the lands or the right of way of the Chicago & Erie Railroad Company, and you should not assess any damages for an injury or damage to defendant, Hoffman's, lands oc-

casioned by the natural flow of water through public drains or natural water courses across plaintiff's right of way to Hoffman's land. * * *

"No. 6. You should not assess any prospective damages against the plaintiff, Chicago & Erie Railroad Company, which may arise in the future from the happening of some possible but uncertain event; the defendant, Hoffman, has the burden of proving by a preponderance of the evidence that he is damaged by the improvement made by the Chicago & Erie Railroad Company respecting drainage, and that the damage was such as would or did naturally and ordinarily result from, or was incident to the improvement and if defendant, Hoffman, has failed to prove by a preponderance of the evidence that he has been so damaged, your verdict should be for the plaintiff, Chicago & Erie Railroad Company."

The case was tried on the theory advocated by appellant, except as to the consideration of the farm as a whole, and this question was properly submitted to the jury as one of fact.

Appellant sought and obtained a change in the drainage system and an enlarged outlet to carry off the additional waters accumulated thereby.

The evidence shows that water was collected by appellant from territory that naturally drained elsewhere; that it was drained through artificial channels, with increased velocity and volume, and discharged through a thirty-inch tile laid under appellants' roadbed, into an open ditch which ran through appellees' land; that such ditch overflowed frequently, was filled up so as to interfere with tile drains emptying into it, and that a portion of appellees' land was damaged by the water, which prior to such

change in the drainage system and the ditch on appellees' land, had not been subject to overflow.

The proceeding was under and in pursuance of the statute, §929 *et seq.* Burns 1914, *supra*. On the theory presented by the pleadings and by the

4. instructions tendered by appellant, the case seems to have been fairly tried on its merits, and a correct result reached. There is evidence tending to support the verdict, and the damages awarded are not excessive. *New Jersey, etc., R. Co. v. Tutt* (1906), 168 Ind. 205, 214, 80 N. E. 420; *Toledo, etc., R. Co. v. Wilson* (1909), 44 Ind. App. 213, 217, 86 N. E. 508, 88 N. E. 864; *Baltimore, etc., R. Co. v. Quillen* (1904), 34 Ind. App. 330, 334, 72 N. E. 661; *Pittsburgh, etc., R. Co. v. Atkinson* (1912), 51 Ind. App. 315, 323, 97 N. E. 353; *Cleveland, etc., R. Co. v. Griswold, supra*; *Culbertson v. Knight* (1898), 152 Ind. 212, 125, 52 N. E. 700. The question of appellant's right to acquire an easement in a public ditch already established is not presented, considered or decided in this case.

We have in effect considered all the questions duly presented, and find no error prejudicial to appellant's rights. Judgment affirmed.

NOTE.—Reported in 119 N. E. 169. See under (1) 22 Am. St. 51, 15 Cyc 706, 715; (2) 15 Cyc 704; (3) 15 Cyc 873; (4) 15 Cyc 908.

CITY OF MICHIGAN CITY v. MARWICK ET AL.

[No. 9,307. Filed June 6, 1917. Rehearing denied April 4, 1918.]

1. PLEADING. — *General Denial.* — *Evidence Admissible.* — Facts pleaded in paragraphs of answer which are not by way of con-

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- fession and avoidance, but directly controvert or rebut matters pleaded by the complaint, are admissible in evidence under the general denial. p. 299.
2. RECORDS.—*Records of Municipal Corporation.—Right to Examine.*—Taxpayers of a municipality have a right to examine its books and records at proper times for any legitimate purpose. p. 300.
3. MUNICIPAL CORPORATIONS.—*Right of Taxpayers.—Public Funds.—Enjoining Misappropriation.*—Taxpayers of a municipality may enjoin municipalities and their officers from misappropriating public funds under their control, as such funds belong beneficially to the taxpayers. p. 301.
4. MUNICIPAL CORPORATIONS.—*Right of Taxpayers.—Misappropriation of Public Funds.—Investigation and Recovery.*—Where public funds have been misappropriated, and the municipality and its proper officers on demand refuse to proceed to cause such funds to be restored, taxpayers, in the interest of themselves and all others similarly situated, may take steps to recover such funds in behalf of the municipality and to that end may conduct investigations and commence and prosecute appropriate actions. p. 301.
5. MUNICIPAL CORPORATIONS.—*Misappropriation of Public Funds.—Taxpayer's Action to Recover.—Pleading.*—In an action prosecuted by taxpayers of a municipality to recover misappropriated public funds, the complaint must affirmatively disclose their interest as that they are taxpayers. p. 301.
6. MUNICIPAL CORPORATIONS.—*Misappropriation of Public Funds.—Taxpayer's Action to Recover.—Costs and Expenses.*—Where, by steps which they are authorized to take, taxpayers cause to be restored to the municipality funds wrongfully sequestered or misappropriated, they may retain out of the fund or recover from the municipality their reasonable costs and expenses incurred, including the reasonable expense of procuring the services of expert accountants. p. 302.
7. SUBROGATION.—*Right to Subrogation.—Actions.—Complaint.—Sufficiency.*—In an action against a city by expert accountants to recover for certain services, where the complaint alleged that certain citizens and taxpayers of a city apprised the city officials of facts sufficiently definite to require that the city's financial affairs be investigated, and that they requested such officials to cause an investigation to be made, which request was denied, whereupon such citizens and taxpayers engaged plaintiffs, who, on auditing the city's books, discovered a shortage, which was subsequently made good, but not averring that such citizens or taxpayers were insolvent, nor disclosing any other reason why they could not be required to perform their obligations to pay

plaintiffs for their services, so that it was necessary for plaintiffs to resort to subrogation or any equitable principle to recover what was due them, such complaint is insufficient to state a cause of action against the city on the theory of subrogation of the claim the taxpayers held against the municipality, since the facts alleged show only that such citizens and taxpayers were indebted to plaintiffs, and that, having discharged their indebtedness, they might recover from the city the reasonable value of plaintiff's services. pp. 303, 306, 312.

8. SUBROGATION.—*Theory.—Applicability.*—Subrogation is defined as the equity by which a person who is secondarily liable for a debt, and who has paid it, is put in the place of the creditor, and it is applied where a man pays a debt which could not properly be called his own, but which it was his interest to pay. p. 305.
9. SUBROGATION.—*Defenses.—Adequate Remedy at Law.*—The remedy of subrogation being equitable in nature, the established maxims of equity are applicable, and ordinarily one may not resort to subrogation where he has a clear and adequate remedy at law. p. 306.
10. SUBROGATION.—*Actions.—Parties.*—Ordinarily the remedy by subrogation cannot be applied unless those whose rights will thereby be affected are parties to the proceeding. p. 306.
11. SUBROGATION.—*Actions.—Parties.*—In an action by expert accountants against a city for subrogation of the rights of a committee of citizens and taxpayers who had employed them to examine the city's books, the citizens' committee were necessary parties in view of the fact that the amount of compensation to be paid plaintiffs was in dispute. p. 314.

From LaPorte Circuit Court; *Thomas W. Slick*, Special Judge.

Action by James Marwick and others against the city of Michigan City. From a judgment for plaintiffs, the defendant appeals. *Reversed.*

Theron F. Miller, for appellant.

Hickey & Wolfe, for appellees.

CALDWELL, J.—Appellees, in 1906, as expert accountants, audited certain official books and records of appellant city, by the procurement of a certain organization of citizens and residents of appellant known as the "Citizens' Committee." Appellees

brought this action against appellant to recover compensation for such services. A trial resulted in a verdict for \$2,000 principal, \$960 interest, total \$2,960, on which judgment was rendered. The errors assigned in this court and not waived are based on the overruling of the demurrer to the complaint, the sustaining of the demurrer to appellant's fifth paragraph of answer, and the overruling of the motion for a new trial.

The complaint is lengthy, but its substance is as follows: In August, 1906, certain citizens and residents of Michigan City became convinced, through rumor and current report, that by reason of errors in bookkeeping or otherwise the funds of the city had not been properly or legally accounted for by the then treasurer and his immediate predecessor for the period from September 1, 1898, to December 31, 1905; that such citizens thereupon determined to institute a careful investigation, and to that end to form an organization of citizens and taxpayers, to employ counsel and engage the services of capable accountants; that, following out such plan, there was formed in said city an organization known as "the Citizens' Committee"; that said committee for the purpose of having the financial books and records of the city examined, to the end that the then condition of its funds might be ascertained, secured the assistance of appellees, who are chartered accountants, and who pursuant to an understanding and agreement with the committee, thereupon proceeded to examine such books and records for the period from September 1, 1898, to December 31, 1905; that in doing such work appellees were first employed by said "citizens' committee and taxpayers' league of said Michigan City on behalf of

said city and for the benefit of said city''; that prior to causing said work to be commenced, said taxpayers' league had informed the mayor and common council of the city of their belief that a large sum of the funds of the city had been misappropriated within the period aforesaid, and requested and urged that an examination and audit of the financial books and records of the city be made by such officials, but that they refused to do so; that thereupon appellees, at the request of said citizens' committee, commenced and prosecuted such investigation; that soon it became evident to appellees, to the committee, and to such officials, that the treasurers of the city within the period aforesaid had committed serious errors in the management of the finances of the city, whereupon "said city officials including the mayor and members of the common council * * * directed, approved and assisted these plaintiffs with their said work, and continued from time to time to consult with, advise, direct, outline and amplify said examination and audit that said plaintiffs were making under the direction of said committee and said city officials''; that appellees, by an examination of the financial books and records for the period from September 1, 1898, to November 30, 1905, ascertained that the city treasurer in office during said period possibly by mistake had failed to account for and had appropriated to his own use \$3,082.63 of the city's money; that such treasurer on being apprised of the facts paid such sum into the office of the treasurer of the city, and to his successor then in office; that said money was recovered "solely as a result of said audit and examination of said books by these plaintiffs, and with the approval and under the direc-

tion and at the instance of said city officials and the said citizens' committee"; that an examination of the books and records in the city treasurer's office for the period from November 30, 1903, to January 1, 1906, disclosed that the treasurer's accounts were short \$10,383.87, "which shortage was discovered by the audit made by these plaintiffs at the request of said citizens' committee, and with the approval and under the direction of said city officials of Michigan City; that as a result of said investigation and audit made by these plaintiffs, there has been paid into the office of the treasurer of Michigan City, Indiana," \$13,466.50; that at the request of the citizens' committee, and with the knowledge and approval and under the direction of the city officials of said city, appellee devoted a great deal of time to such examination, and that \$6,000 is reasonable compensation therefor; that repeated demands have been made for the payment of said sum to appellees, which demands have been refused, and that by reason of the premises there is due appellees \$6,000 and interest; wherefore they ask judgment for \$8,000.

Appellant filed an answer in five paragraphs, the first of which was a general denial. The matter pleaded by the second, third, and fourth para-

1. graphs was admissible in evidence under the general denial, as such answers were not by way of confession and avoidance, but the facts thereby pleaded were of a nature directly to controvert or rebut the facts pleaded by the complaint. Such paragraphs, however, were not challenged by motion or demurrer, and we, therefore, do not outline their substance. The fifth paragraph of the answer was in substance that appellees were not residents of Indiana,

or inhabitants or taxpayers of Michigan City, Indiana, and therefore had no right to bring or maintain this action.

The question whether the court erred in sustaining the demurrer to the fifth paragraph of answer depends on the theory of the complaint. Such paragraph impliedly assumes that the services for which a recovery is sought by the complaint are those services which taxpayers under certain circumstances may cause to be performed in safeguarding public funds, and in causing them to be restored if misappropriated, and for the reasonable expense of which such taxpayers under certain circumstances hereinafter outlined may recover compensation from the municipality or body politic involved. If such is the theory of the complaint, and it may be said that the overruling of the demurrer to it presents the same question as the sustaining of the demurrer to the fifth paragraph of answer, since the former contains no averment that appellees are or were taxpayers of Michigan City. We therefore proceed first to consider the sufficiency of the complaint and incidentally its theory.

Taxpayers of a municipality have a right to examine its books and records at proper times for any legitimate purpose. *State, ex rel. v. King*

2. (1900), 154 Ind. 621, 57 N. E. 535; 2 Dillon, Mnn. Corp. (5th ed.) §560; *State, ex rel. v. Williams* (1903), 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418, and note; *Matter of Egan* (1912), 205 N. Y. 147, 98 N. E. 467, 41 L. R. A. (N. S.) 280, Ann. Cas. 1913E 56, and note.

They may also proceed in equity to enjoin municipalities and their officers from misappropriating pub-

lic funds under their control. Such right is

3. grounded on the relation which taxpayers bear to the municipality, which relation is analagous to that existing between the stockholders of a private corporation and the corporate entity. By reason of such relation, public funds under the control of the municipality and its officers belong beneficially to the taxpayers, and hence where the necessity to do so exists, they may take steps to protect such funds. *Kimble v. Board* (1903), 32 Ind. App. 377, 66 N. E. 1023; *Zuelly v. Casper* (1902), 160 Ind. 455, 67 N. E. 103, 63 L. R. A. 133; *Pierce v. Hagans* (1908), 79 Ohio St. 9, 86 N. E. 519, 36 L. R. A. (N. S.) 1, and note, 15 Ann. Cas. 1170. See, also, note to *Sutton v. Buie*, L. R. A. 1915D 178.

Where the misappropriation of public funds has been accomplished, and the municipality and its proper officers on demand refuse to proceed to

4. cause such funds to be restored, taxpayers in the interest of themselves and all others similarly situated may take steps to recover such funds in behalf of the municipality, and to that end may conduct investigations, commence and prosecute actions, etc. In any such action, however, the

5. complaint must affirmatively disclose their interest as that they are taxpayers. *Zuelly v. Casper, supra*; *Davis v. Fogg* (1881), 78 Ind. 301; *Wright v. Floyd* (1908), 43 Ind. App. 546, 86 N. E. 971; 5 McQuillen, Mun. Corp. §2585; 4 Dillon, Mun. Corp. (5th ed.) §1580; *Cathers v. Moores* (1907), 78 Neb. 13, 110 N. E. 689, 14 L. R. A. (N. S.) 298 and note; 28 Cyc 1747.

Where by steps which they are authorized to take as measured by the foregoing propositions, taxpayers

cause to be restored to the municipality public funds theretofore wrongfully sequestered or misappropriated, they may retain out of the fund or recover from the municipality their reasonable costs and expenses incurred, including the reasonable expense of procuring the services of expert accountants. *Kimble v. Board, supra*, and cases.

We proceed to consider the complaint in the light of the foregoing propositions: It contains no averment that appellees were citizens and taxpayers of Michigan City. They do not sue in such capacity. They seek to recover for services performed as expert accountants under the procurement of a citizens' committee, and alleged to have resulted in the restoration to the city of a large amount of public funds which but for their action would have been lost to the public. It is not possible to determine from the transcript the exact theory of the complaint as adopted by the trial court, and the parties in the court below, or the specific grounds upon which appellees base their right to maintain this action. There are certain allegations pointing to a theory of implied contract between appellees and the city as the allegations, to the effect that appellees under employment by the citizens' committee, commenced the work of examining the books and records of the city, whereupon, while they were engaged at such work, the mayor and members of the common council from time to time consulted with, advised and assisted appellees, and directed, outlined and amplified such work. However, appellees in this court do not contend that the complaint states a cause of action on the theory of contract, either express or implied, between them and the city. Their contention here is that the complaint

is good on the theory of subrogation. The argument is as follows: Certain taxpayers demanded that the city officials cause the books to be audited; the demand was refused; appellees thereupon under employment by such taxpayers did the work which resulted in the discovery that a city treasurer and his predecessor were short in their accounts, whereupon, by reason of such work and discovery, the amount of the shortage was restored to the city; by reason of the facts such taxpayers were entitled to be reimbursed either out of the fund or by recovery from the city for their reasonable expense in causing such investigation to be made, including reasonable compensation for appellees; that appellees, having performed the work, are entitled to be subrogated to the rights of such taxpayers, and may therefore maintain this action against the city.

As appellees do not claim that the complaint states a cause of action in their favor except as the equitable doctrine of subrogation is invoked, it results

7. that, unless it is sufficient on such theory, we should hold that the court erred in overruling the demurrer by which appellant sought to test its sufficiency. A complaint to enforce a claim for subrogation should state the particular facts upon which the claim is founded. *Lilly v. Dunn* (1884), 96 Ind. 220. It may be fairly gathered from the complaint that certain citizens and taxpayers of Michigan City apprised the city officials of facts sufficiently definite to make it appear that reasonable diligence in the discharge of official duty required that the financial affairs of the city be investigated, and that they requested such officials to cause such investigation to be made, and that such

request was denied; that such citizens and taxpayers thereupon proceeded to cause such work to be done, and to that end engaged appellees; that appellees thereupon under such engagement audited the books of the city, discovering a shortage, which was subsequently made good, as alleged, and that thereby such citizens and taxpayers incurred a liability to appellees for the reasonable value of their services. It is our judgment that such citizens and taxpayers under the facts averred are entitled to recover from the city the reasonable expense of such investigation, including any reasonable amount paid by them to appellees for services in conducting such investigation. Viewing the complaint, then, in its aspect most favorable to the correctness of the court's ruling, and it results that such citizens and taxpayers, by reason of the facts averred, are indebted to appellees for the reasonable value of their services, and that such citizens and taxpayers, having discharged such indebtedness, might recover from the city as expenses incurred the reasonable value of such services. The liability of such citizens and taxpayers to appellees is grounded on the mere fact of the performance of the service under an employment to that end. Additional elements must exist, however, in order that the city may be liable to such citizens and taxpayers, among them a demand and refusal, as we have already indicated. We are unable to discover, however, from the facts averred any theory under which appellees may be subrogated to the rights of such citizens and taxpayers. Appellees neither by their prayer for relief nor otherwise in their complaint ask to be subrogated. They disclose no reason why such principle should be applied. They have discharged no obligation

which such citizens and taxpayers were primarily required to discharge. They did nothing under compulsion, or in order to protect themselves in any right. They merely, pursuant to an agreement voluntarily entered into, did a certain work, by which the relation of debtor and creditor exists between them and such taxpayers. There is no allegation disclosing a necessity to resort to subrogation or any other equitable principle in order that they may recover what is due them. There is no allegation that such citizens and taxpayers are insolvent, nor is other reason disclosed why the latter may not be required to perform their obligation. The situation here is somewhat analagous to a case free from fraud, wherein one advances money to another for the payment of an incumbrance against the latter's property, moved merely by a promise of repayment, and without any interest of his own to protect, and in the absence of any agreement for subrogation. It is held in such a case that there can be no subrogation. *Heiney v. Lontz* (1896), 147 Ind. 417, 46 N. E. 665, and cases.

Subrogation is defined as the equity by which

8. a person who is secondarily liable for a debt, and has paid the same, is put in the place of the creditor. Bispham, *Equity* (9th ed.) §335. It is applied where a man pays a debt which could not properly be called his own, but which it was his interest to pay. 2 Bouvier, *Law Dictionary* (Rawle's 3d ed.) 3166, 3167. Other definitions and applications of the principle are found in *Townsend v. Cleveland, etc., Co.* (1897), 18 Ind. App. 568, 47 N. E. 707.

While the remedy by subrogation may be somewhat broader than indicated by any of the definitions or

applications above set out or referred to, yet it

9. it is a principle of general application that such remedy is allowed by the courts only when necessary to the ends of justice. *Edinburgh, etc., Mortgage Co. v. Latham* (1882), 88 Ind. 88. The remedy being equitable in nature, the established maxims of equity are applicable. Thus, ordinarily one may not resort to subrogation where he has a clear and adequate remedy at law. 37 Cyc 373 and cases.

No reason is disclosed here why appellees may not enforce every right to which they are entitled by proceeding against their employers. Moreover,

10. the members of the citizens' committee are not parties to this action. Ordinarily the remedy by subrogation cannot be applied unless those whose rights will thereby be affected are parties to the proceeding. 37 Cyc 388 and cases; 20 Ency. Pl. and Pr. 997; *Rush's Admr. v. State* (1863), 20 Ind. 432; *Citizens', etc., R. Co. v. Robbins* (1896), 144 Ind. 671, 677, 42 N. E. 916, 43 N. E. 649.

If appellees may maintain this action on the theory of subrogation, such citizens and taxpayers will thereby be affected, since the former may recover

7. only by basing their right to do so, not only on a liability of the latter to them, but also on a liability of the city to such citizens and taxpayers. The effect of a recovery here, then, would be to discharge the latter liability in a proceeding in which the creditors to such relation are not parties. While the absence of such taxpayers as parties, perhaps, may not be considered in determining the sufficiency of the complaint as against a demurrer for want of facts, it would seem to be legitimate to consider such element in determining the theory of the complaint,

when such theory is not apparent. We do not believe that the complaint states a cause of action for subrogation. It is practically conceded, and in which concession we concur, that a cause of action against the city is not stated on the theory of contract express or implied. It follows that the court erred in overruling the demurrer to the complaint.

The appellees cite in support of the ruling of the court *Huffmond v. Bence* (1891), 128 Ind. 131, 27 N. E. 347, and *Clark v. Marlow* (1897), 149 Ind. 41, 48 N. E. 359. In the *Huffmond* case, Rudisill had conveyed his lands to Huffmond under such circumstances as that a lien was reserved to secure his support and maintenance by the grantee. The grantee having refused to perform the obligation, Rudisill procured performance from another, who, after the decease of Rudisill insolvent, brought an action against the grantee to recover the value of his services, and by subrogation to enforce the lien which Rudisill had reserved against the land. The court, in holding that such remedy was open to him, gives force to the fact that Rudisill died insolvent, and that no other method was open by which the claimant might recover for the services performed. The *Clark* case is of a like nature. It is apparent that there are equities in each of those cases absent here, calling for the application of the principle of subrogation. Under the circumstances here, we discover no reason why, in an action by appellees against their employers, the latter might not, by a proper notice, bind the city by the result of the litigation on the questions of whether appellees under employment performed such service and the value thereof. As the complaint was not construed in the trial court as proceeding on the

theory that appellees sued as taxpayers, and as appellees do not plant themselves on such theory here, and as such theory is not tenable under the averments, the fifth paragraph of answer is foreign to the complaint, and available error cannot be predicated on sustaining a demurrer to it.

The sufficiency of the evidence is also questioned. If, as we hold, the complaint fails to state a cause of action in favor of appellees and against appellant, we would be required to hold also that the evidence is insufficient to sustain the verdict. The evidence is sufficient that the citizens' committee employed appellees to audit the books and accounts of the city treasurer covering a designated period, and that the committee agreed to pay appellees \$2,000 for the work and that appellees did the work. There was no evidence, however, under the views which we have expressed, establishing appellees' right to be subrogated to any claim which such committee might have against the city. For this reason alone, we are required to hold that the evidence is not sufficient to sustain the verdict. It is not necessary that we determine whether the evidence discloses facts upon which such taxpayers might have a claim against the city on account of the expense of conducting such investigation, including the reasonable value of appellee's services. There is no doubt that such taxpayers demanded of appellant through its mayor and common council that such books be audited. It is clear that two successive treasurers were found to be short in their accounts, and that the shortage was made good. It is far from clear, however, that the city through its proper officials refused to cause such audit to be made, or that any work done by appellees

was instrumental in procuring the sums of money that had not been accounted for to be restored to the city. In a general way the facts are as follows: Early in 1906, the city controller discovered irregularities in the books of the city treasurer. For the most part the discrepancy seems to have consisted of a shortage in the treasurer's bank account as compared with the treasurer's and controller's books. The facts having been reported to the city council, two successive committees were appointed to investigate the matter. These committees found the treasurer's bank account short something more than \$6,000, and that the treasurer's books had been poorly kept. The treasurer satisfied the committees and common council, and apparently the controller, that he had the money on hand, and he properly entered it on his accounts, and placed it in bank. The council directed that all money thereafter be kept in bank, and ordered the controller to continue the investigation of the city finances. Shortly thereafter the controller, on his own motion, communicated with appellees with reference to their auditing the city's accounts, and afterwards a citizens' committee was organized, which employed appellees to make such an audit for a certain period. Appellees discovered a certain shortage, and were paid for their services by such committee. A few weeks later, possibly in July, such committee or a new organization of citizens, employed appellees to make a complete investigation of the accounts of the city. On August 20, the committee in writing requested the mayor and common council to cause such an investigation to be made, and to employ appellees for that purpose. The city officials refused to em-

ploy appellees, but did not expressly refuse to cause the investigation to be made. On the contrary, on the same date, and at the meeting where such request was made, the officials appointed a committee, composed of two bank cashiers and one ex-county treasurer, to have charge of the investigation, and to employ all necessary assistants. This committee on August 30 declined to serve, assigning as a reason that two members of the committee were sureties on the treasurer's bond, and that there was some objection to the committee acting on account of such fact. On the same date, a committee composed of the mayor and three members of the council was appointed to conduct the investigation with power to employ accountants, etc. This committee in an interview with the city treasurer ascertained that he had arranged, at his own expense, to employ Arthur Young and Company, a firm of chartered and certified public accountants, to conduct the investigation. The committee expressed itself as satisfied with the arrangement, the city not to be charged with the expense of the investigation. Early in September, Young and Company commenced such work. A few days later appellees, under employment by the citizens' committee consummated August 24, 1906, commenced the work for which a recovery is sought in this action. Thereafter two sets of accountants were prosecuting such investigation independent of each other. Young and Company completed the work first. The city adopted their figures, and settlement was made with the treasurer and his predecessor accordingly. The accounts of the city have since been based on Young and Company's report. Both sets of accountants found shortages, but we are unable to determine from

the evidence whether their figures agreed. Appellees neither directly nor indirectly made a definite report to the city. There was evidence that on several occasions they offered to do so on condition that the city would pay them for their services, but that the city officials insisted on seeing the report before they determined whether they would do so. Early in 1907 controversy arose between the citizens' committee and appellees respecting what was due the latter. The committee insisted that the agreed price was \$2,000; appellees denied that there was any agreement as to amount, and insisted on a larger sum. Subsequently this action was commenced against the city. It is plain from the evidence that the city by its proper officials did not at any time expressly refuse to cause the accounts of the city to be investigated. We are not required at this time to express any opinion whether there was evidence justifying an inference of a refusal by implication or by conduct.

For errors indicated, the judgment must be reversed. The judgment is reversed, with instructions to sustain the demurrer to the complaint, with permission to amend if desired.

ON PETITION FOR REHEARING.

CALDWELL, J.—It is not held by the original opinion that the insolvency of appellees' employers is essential in order that the former may appeal to the equitable doctrine of subrogation. The absence of an allegation of insolvency is mentioned merely by way of illustration in calling attention to the fact that the complaint reveals no reason why it is necessary to invoke that doctrine, in order that appellees may be protected, and that their rights may be fully en-

forced. By outlining some of the circumstances in which, if existing, appellees might possibly through subrogation maintain an action against appellant for the value of their services, we should not be understood as excluding others. That it is difficult to circumscribe specifically all the situations to which the principle of subrogation may be applied is thus expressed: "The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. * * * No general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable in any particular case depends upon the peculiar facts and circumstances of such case.'" *Aultman v. Bishop* (1898), 53 Neb. 545, 74 N. W. 55.

The complaint here merely discloses that certain citizens of Michigan City, their names and how numerous not being alleged, were justified in

7. employing appellees to audit the financial books of that city; that appellees did the work under such employment, and that under the facts they would be entitled to recover from their employers either the value of such services, or at the contract rate if there was a contract on that subject as insisted by such citizens, but denied by appellees, and that thereupon such citizens would be entitled to recover from the city their reasonable costs and expenses incurred. The complaint discloses no reason why appellees may not fully and expeditiously recover all that is due them by proceeding on the contract of employment. As we have said, the complaint is entirely silent on the subject of subrogation. It contains no

facts invoking that or other equitable doctrine, unless the facts above outlined are sufficient to that end, and we do not believe that they are. The action when measured by the complaint is merely at law for the recovery of a money judgment. The pleader apparently undertook to state a cause of action against the city and in favor of appellees by certain allegations, to the effect that the city through certain officials approved of the work being done by appellees, and directed them in doing it. It is not contended in this court that such allegations make the complaint good as stating a cause of action at law against the city, or that such allegations strengthen the complaint on the theory of subrogation.

In the original opinion we called attention to the fact that the members of the citizens' committee were not parties to the proceeding as indicating somewhat that subrogation is not the theory of the complaint. We should not, however, be understood as holding that under all circumstances the person to whose rights another seeks to be subrogated is a necessary party in a proceeding to that end. In 37 Cyc, at page 388, it is said that the right of subrogation, being equitable in its nature, cannot be enforced in proceedings to which those whose equities are affected are not parties, and in 20 Ency. Pl. and Pr., page 997, that as a general rule a court of equity will not make an order of subrogation without having before it all the parties that may be affected by the operation of such order. For illustrative and somewhat conflicting cases, see the following: *Bond v. Montgomery* (1892), 56 Ark. 563, 20 S. W. 525, 35 Am. St. 125; *Wilkins v. Gibson* (1901), 113 Ga. 31, 38 S. E. 374, 84 Am. St. 206; *Aultman v. Bishop*, *supra*; *Hill*

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v. *Ritchie* (1916), 90 Vt. 318, 98 Atl. 497, L. R. A. 1917A 731; *Fridenburg v. Wilson* (1883), 20 Fla. 359, 367.

In each of the following there was an order of subrogation to a discharged claim, the former claimant not being a party to the proceeding: *Spaulding v. Harvey* (1891), 129 Ind. 106, 28 N. E. 323, 13 L. R. A. 619, 28 Am. St. 176; *White River School Tp. v. Dorrell* (1900), 26 Ind. App. 538, 59 N. E. 867; *Neptune v. Tyler* (1895), 15 Ind. App. 132, 41 N. E. 965.

As we have said, the members of the citizens' committee under the facts alleged have an inchoate right of action against the city to recover expenses incurred in prosecuting an investigation of the books. Their claim, while perhaps incomplete until they have actually paid costs and expenses, has not been discharged. Assuming that by proper pleading appellees, on account of having performed services alleged, may by subrogation proceed against the city, the effect of the recovery would be to discharge the claim of the members of the committee. Such would be the effect of an order of subrogation. Moreover, the record here discloses that there is controversy between appellees and the members of the committee respecting the amount that the latter agreed to pay the former for such auditing work, or whether there was any agreement fixing the amount. If the former may be subrogated to the rights of the latter against the city, in no event could there be a recovery beyond the contract price. A recovery then by appellees against the city would not only in effect discharge the claim of the committee members against the city, but also determine such controversy. Under such circumstances it is our

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judgment that in the absence of some sufficient reason appearing, the members of the citizens' committee are necessary parties to such a proceeding.

Petition for rehearing overruled.

NOTE.—Reported in 116 N. E. 434, 119 N. E. 154.

ILLINOIS CAR AND MANUFACTURING COMPANY v. BROWN.

[No. 9,222. Filed May 11, 1917. Rehearing denied April 7, 1917. Transfer denied April 5, 1918.]

1. MASTER AND SERVANT.—*Injuries to Servant.—Negligence.—Un-guarded Machinery.—Statute.*—Under §9 of the Factory Act, Acts 1899 p. 231, §8029 Burns 1914, requiring that all vats, pans, etc., be properly guarded, failure to guard the specified machinery is negligence *per se*, and all dangerous machines of every description must be properly guarded, if it is practicable to do so. p. 322.
2. MASTER AND SERVANT.—*Injuries to Servant.—Guarding Machinery.—Practicability.—Jury Question.*—Under §9 of the Factory Act, Acts 1899 p. 231, §8029 Burns 1914, requiring certain machinery to be properly guarded, whether a particular machine is dangerous, and whether it is practicable to guard it, are questions of fact for the jury. p. 322.
3. MASTER AND SERVANT.—*Injuries to Servant.—Action.—Com-plaint.—Sufficiency.*—In a servant's action against the master for injuries sustained by the breaking of an emery wheel, a complaint alleging that the wheel was unguarded, contrary to the laws of Indiana, that while unguarded it was dangerous to employes, and that the wheel could have been guarded at a small expense, so as to make it safe, and without interfering with the proper use thereof, is good as against a demurrer on the ground that an emery wheel is not such a machine as §9 of the Factory Act, Acts 1899 p. 231, §8029 Burns 1914, requires to be guarded. p. 322.
4. MASTER AND SERVANT.—*Injuries to Servant.—Assumption of Risk.—Violating Statutory Duty.*—In a servant's action against the master for personal injuries, the doctrine of assumed risk has no application where the alleged negligence consists of the violation of a duty imposed by statute. p. 323.

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5. **MASTER AND SERVANT.—Injuries to Servant.—Guarding Dangerous Machinery.—Statute.**—Under §9 of the Factory Act, Acts 1899 p. 231, §8029 Burns 1914, where it is not practicable to guard a dangerous machine so fully and securely as to eliminate all danger, but it is practicable to guard it partially and thereby reduce the danger to the minimum, such partial guarding is in compliance with the statutory requirement. p. 325.
6. **APPEAL.—Review.—Answers to Interrogatories.—Verdict.—Presumptions.**—In determining whether there is an irreconcilable conflict between the answers to interrogatories and the general verdict, the court on appeal must indulge in all inferences and reasonable presumptions in favor of the general verdict, and may consider any fact favorable under the issues. p. 326.
7. **APPEAL.—Review.—Answers to Interrogatories.—Verdict.—Conflict.**—In a servant's action for personal injuries resulting from the breaking of an unguarded emery wheel, a general verdict for plaintiff is not in irreconcilable conflict with answers to interrogatories to the effect that it was necessary to leave one-quarter of the wheel exposed when equipped with a guard, since such exposed portion might have been the lower quarter of the wheel, the breaking of which would not have injured the plaintiff. p. 326.
8. **MASTER AND SERVANT.—Injuries to Servant.—Negligence.—Proof.**—In a servant's action against the master for personal injuries sustained when an unguarded emery wheel broke, it was necessary to show, in order to sustain a finding that defendant was negligent, that the employer should have anticipated the exact injury, but it is sufficient if by ordinary care and prudence the employer should have known that some injury might result from the failure to guard the wheel. p. 328.
9. **MASTER AND SERVANT.—Injuries to Servant.—Negligence.**—In a servant's action for injuries caused by the breaking of an unguarded emery wheel, where the jury found that such wheel was dangerous, defendant was bound to take notice of its dangerous character and anticipate that injury would result from failure to properly guard it. p. 328.

From Porter Circuit Court; *H. H. Loring*, Judge.

Action by William Brown against the Illinois Car and Manufacturing Company. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Bomberger, Curtis, Starr & Peters and *Elmer E. Stevenson*, for appellant.

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Milo M. Bruce and D. E. Kelly, for appellee.

DAUSMAN, J.—This action was instituted by appellee to recover damages for personal injuries resulting from alleged negligence. The cause was tried on the issue formed by the general denial addressed to the first paragraph of amended complaint, a demurrer to said paragraph having been overruled and all other paragraphs of complaint having been withdrawn. Verdict and judgment for appellee in the sum of \$4,741.

The errors assigned are: (1) The court erred in overruling the demurrer to the first paragraph of amended complaint; (2) the court erred in overruling appellant's motion for judgment on the interrogatories and answers thereto; and (3) the court erred in overruling appellant's motion for a new trial.

The body of the said paragraph of complaint is as follows: "That the defendant is now and was on the 1st day of November, 1910, a duly organized and existing corporation, and engaged in the manufacture and repair of railroad cars, among other things, at Hammond, Indiana, and it was the owner of a number of buildings in which it carried on said work or business, and employed several hundred men therefor. That the plaintiff, at the time of receiving the injury hereafter mentioned, was married and thirty-one years of age, and was strong, robust and in good health at the time of his injury herein stated. That at the time of said injury the plaintiff was in the employ of the defendant and was working in one of the defendant's said buildings known as the blacksmith shop in which was a certain iron shaft with pulleys, belts and emery wheels which were operated, when used as hereafter stated, by means of electric power,

and all of which were used as provided by the defendant in connection with its said work; that in the center of each of said emery wheels was a one-inch hole; that either of said emery wheels when used as aforesaid, was placed over and attached, by means of said hole, to either end of said shaft, which was about twenty inches long, with threads and flange-burs on each and to clasp and hold the wheel being used; that at the center or middle of said shaft was a pulley connected by means of a belt to another pulley, which was also attached to a shaft; that said emery wheel shaft was attached to a certain cast iron box about one foot high, one foot long and one foot wide, with two of its sides at the top curved or concaved, in which the pulley on said shaft revolved; that said cast iron box rested upon and was attached by bolts to a plank bench, or table, about two feet wide and four feet long and the top thereof about three feet from the ground or floor. That said emery wheels were provided and used by the defendant to grind various kinds of iron, steel, and other metal and revolved at great rapidity, about three thousand revolutions per minute, when being used and operated as aforesaid, and it was necessary for the person thus using one of said emery wheels to stand immediately in front of it, which revolved towards him. That said emery wheels varied in thickness and diameter to meet the requirements of said work and were kept by the defendant in a particular case or on a shelf provided therefor. That the person using one of said emery wheels was required, and it was his duty, to select therefrom one with which the particular work could be done, and place and replace the same on said emery wheel shaft. That on the 1st day of Novem-

ber, 1910, the plaintiff was directed, ordered, required and permitted to grind a certain cast iron car-truck slide, and undertook to grind and was grinding the same, in the manner heretofore stated, with one of said emery wheels provided and used by the defendant to do that particular work and which was three-eighths of an inch thick and fourteen inches in diameter, which was then and there unguarded, open, exposed, and without guard and protection, contrary to the laws of Indiana, relating to the use of machinery in industrial establishments and providing for the safety of laborers. That said unguarded and unprotected emery wheels, when being used as aforesaid, were dangerous to employes in said blacksmith shop, who were required to work with and about them as defendant well knew prior to the injury complained of herein. That said emery wheels, when being used as aforesaid, could and should have been guarded with a steel hood and guard to fit over the same at small cost, and thereby made safe, without interfering with the proper use thereof, which facts the defendant well knew and could have known by the exercise of ordinary care. That on said date, the plaintiff, while in the exercise of due care and caution, grinding said slide as aforesaid, said emery wheel broke and a part thereof struck him with great force and violence on the front and left side of his head and face and felled him to the ground or floor, where he lay helpless for some time, until found by his fellow workmen; that the plaintiff was then removed to a hospital where he was confined for fourteen days and his injuries received medical treatment; that by said blow the base of plaintiff's skull over his left eye was bruised, fractured and broken, and it was necessary to remove

a number of pieces of bones from his skull; and a wound or cut was inflicted on the left side of his face six or seven inches long, and a part of his scalp torn loose; and a hole made in his skull over his left eye which remained open and festered for a period of five months; and his cheek and lip on the left side of his face were cut, bruised and lacerated and his upper jaw and several of his teeth were made numb and paralyzed on that side of his face; that the nerves and muscles on that side of his face and head were severed, bruised, injured and paralyzed and do not perform their functions as they should and did before said injury; that he was made wholly blind for a period of five days immediately following said injury and his eyesight has been impaired in that they are weak and sensitive to the slightest exposure and exertion; that the left side of his head had become and is becoming enlarged; that said hole over his left eye is now a fourth of an inch or more in depth and three inches long; that his face has been disfigured forever as above stated; and by leaving a deep scar of said length; that he was thereby made sick and caused to continually suffer great excruciating pain in his eyes, face and head and will continue to suffer pain so long as he lives; that he has been made stupid and caused to have weak and dizzy spells which he did not have before said injury; that his memory has been impaired in that he is forgetful; that said injuries have produced a permanent nervous condition and have rendered the plaintiff incapable of performing any labor which requires mental or physical exertion; that by reason of said injuries his mind is impaired and thereby made insane and to suffer from epilepsy. That all of said injuries aforesaid are per-

manent and plaintiff will be permanently disabled during his life. That by reason of said injuries and the negligence of the defendant, the plaintiff has become liable for a hospital bill of \$14.00 and a doctor bill of \$51.00 and has expended considerable money to cure himself of said injuries, the exact amount plaintiff cannot now state, and he was made unable to do any work for eleven months after said injury, and will be required to expend large sums of money therefor in the future. That all of said injuries and things complained of were caused by the negligence of the defendant in not properly guarding said emery wheel and in directing, ordering, requiring and permitting the plaintiff to use the same unguarded, all of which was without fault of the plaintiff."

The alleged defects in the complaint, as presented by appellant's brief, are: (1) That an emery wheel is not such a machine as the Factory Act requires to be guarded; and (2) that the complaint does not negative assumption of risk.

(1) Section 9 of the act commonly known as the Factory Act, Acts 1899 p. 231, being §8029 Burns 1914, contains the following clause: "All vats, pans, saws, planers, cogs, gearing, belting, shafting, set-screws, and machinery of every description therein, shall be properly guarded"; and the sufficiency of the complaint depends upon the construction put upon said clause by the courts. As supporting the first alleged defect appellant relies on the case of *National Drill Co. v. Myers* (1907), 40 Ind. App. 322, 81 N. E. 1103. Evidently in that case the court was misled by the process of reasoning in the case of *Laporte Carriage Co. v. Sullender* (1905), 165 Ind. 290, 75 N. E. 277, in which an attempt was made to

utilize the inapt doctrine of *ejusdem generis* in construing said clause. *Pein v. Miznerr* (1907), 41 Ind. App. 255, 83 N. E. 784. But the Laporte Carriage Company case has been modified and clarified by the decision in the case of *U. S. Cement Co. v. Cooper* (1909), 172 Ind. 599, 88 N. E. 69. Since the National Drill Company case conflicts with the later cases, it must be regarded as having been overruled.

By the many cases in which the courts have construed said clause the following propositions are firmly established: (1) That all vats, pans,

1. saws, planers, cogs, gearing, belting, shafting, and setscrews must be properly guarded, and the failure so to do is negligence *per se*; (2)
2. all *dangerous* machines of every description must be properly guarded, if practicable so to do; and (3) that whether a particular machine is dangerous, and whether it is practicable properly to guard it, are questions of facts for the jury, to be determined from all the circumstances, under proper instructions.

A thoughtful reading of the complaint will disclose that the circumstances are detailed therein with sufficient fulness and definiteness to have entitled

3. appellee to present his case to the jury, as against the first alleged defect. *Monteith v. Kokomo, etc., Co.* (1902), 159 Ind. 149, 64 N. E. 610, 58 L. R. A. 944; *Green v. American Car, etc., Co.* (1904), 163 Ind. 135, 71 N. E. 268; *Buehner Chair Co. v. Feulner* (1904), 164 Ind. 368, 73 N. E. 816; *M. S. Huey Co. v. Johnston* (1904), 164 Ind. 489, 73 N. E. 996; *Robertson v. Ford* (1904), 164 Ind. 538, 74 N. E. 1; *Laporte Carriage Co. v. Sullender, supra*; *Bemis, etc., Co. v. Krentler* (1906), 167 Ind. 653, 79 N. E. 974;

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U. S. Cement Co. v. Cooper, supra; King v. Inland Steel Co. (1911), 177 Ind. 201, 96 N. E. 337, 97 N. E. 529; *Cincinnati, etc., R. Co. v. Armuth* (1913), 180 Ind. 673, 103 N. E. 738; *Inland Steel Co. v. Ilko* (1913), 181 Ind. 72, 103 N. E. 7; *Nickey v. Dougan* (1904), 34 Ind. App. 601, 73 N. E. 288; *Baltimore, etc., R. Co. v. Cavanaugh* (1904), 35 Ind. App. 32, 71 N. E. 239; *National Fire Proofing Co. v. Roper* (1906), 38 Ind. App. 600, 77 N. E. 370; *Kintz v. Johnson* (1906), 39 Ind. App. 280, 79 N. E. 533; *Tucker, etc., Mfg. Co. v. Staley* (1906), 40 Ind. App. 63, 80 N. E. 975; *Grace v. Globe Stove, etc., Co.* (1907), 40 Ind. App. 326, 82 N. E. 99; *U. S. Furniture Co. v. Taschner* (1907), 40 Ind. App. 672, 81 N. E. 736; *Pein v. Miznerr, supra; Robbins v. Ft. Wayne Iron, etc., Co.* (1907), 41 Ind. App. 557, 84 N. E. 514; *Whiteley, etc., Castings Co. v. Wishon* (1908), 42 Ind. App. 288, 85 N. E. 832; *Evansville Hoop, etc., Co. v. Bailey* (1908), 43 Ind. App. 153, 84 N. E. 549; *Hohenstein, etc., Co. v. Matthews* (1910), 46 Ind. App. 616, 92 N. E. 196; *Pinnell v. Cutsinger* (1909), 44 Ind. App. 419, 89 N. E. 493; *Watt v. Mishawaka Paper, etc., Co.* (1913), 53 Ind. App. 682, 99 N. E. 1029; *F. Bimel Co. v. Harter* (1912), 51 Ind. App. 267, 98 N. E. 360; *W. McMillen & Son v. Hall* (1915), 59 Ind. App. 545, 109 N. E. 424.

The doctrine of assumed risk has no application where the alleged negligence consists of the violation of a duty imposed by statute. This is a full

4. and complete answer to the second alleged defect. *Davis Coal Co. v. Pollard* (1901), 158 Ind. 607, 62 N. E. 492, 92 Am. St. 319; *Monteith v. Kokomo, etc., Co., supra; American, etc., Mill Co. v. Hullinger* (1903), 161 Ind. 673, 67 N. E. 986, 69 N. E.

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460; *Green v. American Car, etc., Co., supra*; *Bessler v. Laughlin* (1906), 168 Ind. 38, 79 N. E. 1033; *U. S. Cement Co. v. Cooper, supra*; *King v. Inland Steel Co., supra*; *Vandalia R. Co. v. Stillwell* (1913), 181 Ind. 267, 104 N. E. 289, Ann. Cas. 1916D 258; *Cleveland, etc., R. Co. v. Oesterling* (1914), 182 Ind. 481, 103 N. E. 401; *Doan v. E. C. Atkins & Co.* (1915), 184 Ind. 678, 111 N. E. 312; *Chamberlain v. Waymire* (1903), 32 Ind. App. 442, 68 N. E. 306, 70 N. E. 81; *Brower v. Locke* (1903), 31 Ind. App. 353, 67 N. E. 1015; *Whiteley, etc., Castings Co. v. Wishon, supra*; *F. Bimel Co. v. Harter, supra*; *American Car, etc., Co. v. Wyatt* (1914), 58 Ind. App. 161, 108 N. E. 12; *Benkowski v. Sanders, etc., Co.* (1915), 60 Ind. App. 374, 109 N. E. 924.

(2) On appellant's request the court submitted to the jury thirty-five interrogatories, and appellant contends that the answers to certain interrogatories show that it was impracticable to guard or cover more than three-fourths of the emery wheel; that, in the event of the breaking or bursting of the wheel, fragments would be hurled through the unguarded one-fourth; that all danger would not thereby be eliminated, and that therefore there was no duty resting on appellant to guard the wheel at all. As supporting this contention appellant relies on the following interrogatories and answers:

"14. Was it necessary that one-quarter of the wheel immediately in front of plaintiff be open and exposed? Ans. Yes. 16. In doing the work he was doing, did plaintiff stand in front of and facing the emery wheel? Ans. Yes. 17. While plaintiff was grinding said casting, did the emery wheel break? Ans. Yes. 17½. Did the emery wheel break because

the plaintiff applied side pressure on the same while grinding the car slide? Ans. No. 18. If you answer the last question 'No,' state why it did break. Ans. No evidence."

As above stated, the statutory requirement that every dangerous machine must be properly guarded is limited by one condition only, viz.: *if practicable so to do*.

5. *5. ticable so to do*. The courts have expressed this condition in various words, as evidenced by the following: "without rendering it useless for the purpose for which it was intended" (*Laporte Carriage Co. v. Sullender, supra*); "without destroying its efficiency or use,"; "as not to render it inefficient or useless,"; "without affecting its efficiency or utility,"; "so as not to render it inefficient" (*State v. Rodgers* [1910], 175 Ind. 25, 93 N. E. 223); "without affecting the practical utility of the machinery" (*Cincinnati, etc., R. Co. v. Armuth, supra*); "without impairing its utility" (*Pein v. Mizzerr, supra*); "without destroying their usefulness" (*Robbins v. Ft. Wayne Iron, etc., Co., supra*); "without interfering with its use" (*Evansville Hoop, etc., Co. v. Bailey, supra*); where "it is both possible and practicable" (*Tucker, etc., Mfg. Co. v. Staley, supra*); "wherever it is practicable to do so" (*Morgantown Mfg. Co. v. Hicks* [1910], 46 Ind. App. 623, 92 N. E. 199). From these varying expressions the purpose of the condition may be readily understood.

In this connection we must have a due regard for the importance of the word "properly" as used in the statute. Where it is not practicable to guard a dangerous machine so fully and securely as to eliminate all danger, but it is practicable to guard it partially and in such manner as to reduce the danger to

the minimum, then doubtless such partial guarding is a compliance with the statutory requirement.

By its general verdict the jury necessarily found, as an essential element thereof, that it was practicable to have properly guarded the emery wheel. Now, we are asked to say that on this point there is an irreconcilable conflict between the answers to said interrogatories and the general verdict.

In determining whether such conflict exists, we must consider all the other interrogatories and answers, must indulge all inferences and reason-

6. able presumptions in favor of the correctness of the general verdict, and may consider any fact provable under the issues. *Catterson v. Hall* (1905), 37 Ind. App. 341, 76 N. E. 889; *Pittsburgh, etc., R. Co. v. Lightheiser* (1906), 168 Ind. 438, 78 N. E. 1033; *Louisville, etc., R. Co. v. Creek* (1892), 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733.

The following interrogatories may not be ignored: "29. Was it necessary to have a guard or covering over the wheel which plaintiff found on the arbor in order to make it safe for the work he was doing? Ans. Yes. 30. If you answer the last question 'Yes,' state why it was so necessary. Ans. To make it safe."

When all the things which it is our duty and privilege to consider have been taken into account, it becomes apparent that the jurors were con-

7. vinced that an emery wheel when operated at a high rate of speed is likely to break or burst; that it was practicable to have guarded the particular emery wheel with which appellee was working when he received his injuries by covering the upper one-half of said wheel with a hood of steel, securely at-

tached to the bench, leaving the lower part of the wheel exposed, to which exposed portion the workman could apply the object to be ground, and that when so guarded the danger to the workman would have been minimized and the wheel would have been properly guarded with respect to its utility and the safety of the workman.

Interrogatory No. 14 does not definitely locate the quarter of the wheel necessary to be exposed. It can reasonably be construed to refer to the quarter below a horizontal line passing through the center of the wheel, and next to the workman; for that quarter would be "immediately in front" of him. Of course, the proper manner of guarding the wheel was primarily a problem for experienced men—mechanical engineers—rather than lawyers. We assume that appellant in its effort to enlighten the jury on this point presented all the evidence available to sustain its contention. We assume also that the jurors took into account the relative heights of workman and machine, the position and posture of the workman while holding the car slide against the wheel, the fact that the wheel revolved toward him from the highest point on its circumference, and that law of physics which determines the direction a fragment must take when hurled from a rapidly revolving wheel; and that from these considerations the jurors concluded that if the wheel had been guarded as above indicated, the workman's head and body could not have been hit by the flying fragments, and therefore the failure to guard was the proximate cause of his injury. When so understood, the interrogatories and answers harmonize, rather than conflict, with the general verdict.

(3) Under the last assignment of error appellant asserts that the verdict is contrary to law because the accident was one that could not reasonably

8. have been anticipated by appellant. In order to justify the finding that appellant was negligent in failing properly to guard the emery wheel, it was not necessary to show that the identical injury to appellee which resulted from its negligence should have been anticipated; but it is sufficient if by ordinary care and prudence appellant should have known that some injury might result to some of its employes from its failure so to guard the wheel. *Davis v. Mercer Lumber Co.* (1904), 164 Ind. 413, 73 N. E. 899; *Bessler v. Laughlin, supra*; *King v. Inland Steel Co., supra*. The jury has decided that the emery wheel, when

operated in the manner described in the complaint, was a dangerous machine; and it follows, as a matter of law, that appellant was bound to take notice of its dangerous character and to anticipate that injury to its employes would probably result from the failure properly to guard it.

9. From the entire record we are convinced that this cause was ably tried, and we are especially impressed that the jury was correctly instructed and in a spirit of absolute fairness. Judgment affirmed.

NOTE.—Reported in 116 N. E. 4. Master and servant: liability of master to servant injured by bursting of emery wheel, Ann. Cas. 1912B 1334; servant's assumption of risk of master's breach of statutory duty, 26 Cyc 1180, 4 Ann. Cas. 599, 13 Ann. Cas. 36, Ann. Cas. 1913C 210, 19 L. R. A. (N. S.) 646, 22 L. R. A. (N. S.) 634, 33 L. R. A. (N. S.) 646, 42 L. R. A. (N. S.) 1229; duty of master to guard dangerous machinery, 98 Am St. 299; what is comprehended in expression "machinery of every description" as used in statute relative to guards, 30 L. R. A. (N. S.) 36. See under (1, 5) 26 Cyc 1134; (2) 26 Cyc 1463; (3) 26 Cyc 1392; (8, 9) 26 Cyc 1093.

PENNSYLVANIA COMPANY v. STALKER, ADMINISTRATRIX.

[No. 9,404. Filed April 5, 1918.]

1. **COMMERCE.**—*Interstate Commerce.—Injuries to Servant.—Federal Employers' Liability Act.—Assumption of Risk.*—In all actions for personal injuries governed by the federal Employers' Liability Act of 1908, §8657 *et seq.* Comp. Stat. 1918, 35 Stat. at L. 65, all state laws upon the subject are superseded, and the defense of assumption of risk is abrogated in certain cases. p. 336.
2. **MASTER AND SERVANT.**—*Injuries to Servant.—Assumption of Risk.—Procedure.—Federal Employers' Liability Act.*—In an action for personal injuries in a state court coming within the terms of the federal Employers' Liability Act of 1908, §8657 *et seq.* Comp. Stat. 1918, 35 Stat. at L. 65, the procedure is that prevailing in the state courts, and, though what amounts to assumption of risk is substantive law, the method of determining in any case whether an employe has assumed the risk is a question of procedure. p. 337.
3. **MASTER AND SERVANT.**—*Injuries to Servant.—Assumption of Risk.—Jury Question.*—Under the settled procedure of Indiana, it is a question of fact for the jury whether an employe assumed the risk of injury, in view of all the circumstances of the case. p. 337.
4. **APPEAL.**—*Review.—Verdict.—Answers to Interrogatories.—Presumptions.*—In determining whether there is irreconcilable conflict between the general verdict and the answers to interrogatories, the court on appeal must indulge all legitimate inferences and presumptions in favor of the general verdict, and may consider in support of the general verdict any fact provable under the issues and not included in the interrogatories and answers. p. 338.
5. **MASTER AND SERVANT.**—*Injuries to Servant.—Assumption of Risk.*—Being contractual in its origin and nature, assumption of risk will not arise by implication of law from a perilous situation suddenly created. p. 339.
6. **MASTER AND SERVANT.**—*Injuries to Servant.—Assumption of Risk.—Evidence.*—In an action for the wrongful death of a railroad employe where decedent was struck and killed by a west-bound train running on the east-bound track contrary to custom, evidence held not to show that deceased assumed the risk. p. 339.
7. **MASTER AND SERVANT.**—*Injuries to Servant.—Negligence.—Instructions.*—In an action for the wrongful death of a railroad employe due to being struck by a train, the giving of an instruc-

tion that where several acts of negligence are sufficiently alleged it is not essential that all of such negligent acts be proved, but there may be a recovery if it is proved that the injury was the result of some one or more of them, was not error, the acts charged being of such a nature that any one of them or any combination thereof might be found to be the negligence which constituted the proximate cause of the injury. p. 343.

8. **MASTER AND SERVANT.—Injuries to Servant.—Action.—Conflicting Instructions.**—In an action for the wrongful death of a railroad employe who was struck by a train, an instruction that if decedent failed to obey any rule of defendant of which he had notice, or any instruction given him by his supervisor in defendant's service, and such failure contributed to bring about his injury, it might be considered as bearing upon the question of decedent's contributory negligence, but it would not be a defense to the action, is not erroneous and is not in conflict with an instruction to the effect that it was decedent's duty to exercise reasonable diligence to ascertain the rules promulgated by defendant, as it had the legal right to do, and that if decedent voluntarily failed or refused to conform or comply therewith, he assumed the risk, as the first instruction resting on the proposition that a mere failure to obey a rule amounts to contributory negligence, while the second instruction is based on the proposition that a voluntary violation of a rule amounts to assumption of risk. p. 348.
9. **APPEAL.—Review.—Harmless Error.—Instructions.**—Appellant cannot be heard to complain of errors in an instruction which is favorable to him. p. 349.
10. **MASTER AND SERVANT.—Injuries to Servant.—Negligence.—Municipal Ordinance.—Police Regulation.**—In an action based on the federal Employers' Liability Act of 1908, §8657 *et seq.* Comp. Stat. 1918, 35 Stat. at L. 65, for the wrongful death of a railroad employe as a result of being struck by a train, a municipal ordinance prohibiting the running of trains within the corporate limits at a greater speed than ten miles an hour, and fixing a penalty for violations, was admissible as bearing on the question of negligence, since, though all state laws are superseded by the federal statute, the act does not specify what constitutes negligence, but leaves the question to be determined in accordance with the established rules of law. p. 350.

From Porter Circuit Court; *H. H. Loring*, Judge.

Action by Leona F. Stalker, administratrix of the estate of George Stalker, deceased, against the Penn-

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sylvania Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Leonard, Rose & Zollars, for appellant.

E. D. Crumpacker, Grant Crumpacker and *O. L. Crumpacker*, for appellee.

DAUSMAN, J.—This action was instituted by the appellee against the appellant to recover damages resulting from the death of appellee's decedent, who was killed by one of appellant's passenger trains. Verdict and judgment for appellee in the sum of \$1,300.

On September 28, 1913, George Stalker was, and for eight months prior thereto had been, in the employment of appellant as a section man at Valparaiso, Indiana. On said day, and for a long time prior thereto, appellant owned and operated a double-track railroad, extending from the city of Pittsburgh, Pennsylvania, to the city of Chicago, Illinois, through the city of Valparaiso, Indiana. The tracks through Valparaiso run nearly east and west and intersect a number of public streets in said city. One of said streets is known as Franklin street and the next street west of Franklin is known as Washington street. Between said streets and about twelve feet south of the south track was located a toolhouse in which hand cars and tools were stored. Leading from Franklin street to the toolhouse was a cinder path about six feet wide and about six feet south of the south track and running parallel with the track. This path was smooth and had been constructed for the purpose of affording a safe way from Franklin street to the toolhouse. At a point 200 feet east of the toolhouse the tracks curved to the southeast, the curve being

about 900 feet long. There were no buildings on the south side of the tracks near the right of way, and nothing to obstruct the view eastward from said tool house except the gates at Franklin street, the semaphore just east of Franklin street, and the telegraph poles, wires and cross-arms along the south side of the right of way. A person standing in front of the toolhouse near the south line of the track and looking eastward could see an approaching train at a distance of 2,150 feet; and, standing at the same place and looking eastward, could determine on which track the train was approaching at a distance of at least 850 feet. Washington street and Franklin street were guarded by gates. These gates were operated by the tower man in the tower at Washington street. The south gate at Franklin street was equipped with a ratchet gong which rang when the gates were lowered. The tower was equipped with a large dinner bell, and at Franklin street there was an electric gong on an iron pole, and this bell and gong were operated by the tower man when a train approached.

Appellant was engaged in operating passenger and freight trains between Pittsburgh and Chicago. Between fifty and sixty trains ran over its road each day, and from twenty-five to thirty of these were passenger trains. In accordance with the established operating plan, trains going east ran on the south track and trains going west ran on the north track. So perfectly was this plan executed that on one occasion only during Stalker's term of service did a train run west on the south track. But on the morning of September 28, 1913, appellant's passenger train No. 15 was running westward into Valparaiso on the south track, contrary to the custom and against the

current of traffic. This train had been transferred from the west-bound track to the east-bound track at Morgan, a few miles east of Valparaiso, for the reason that the former track was obstructed by a freight train. Train No. 15 was scheduled to arrive at Valparaiso at 5:56 a. m., but on this morning it was running somewhat late and passed the toolhouse between 6:10 and 6:20 a. m.

During the entire period of Stalker's employment he was required to go on an inspection trip over the section on which he worked, with certain other members of the crew, every alternate Sunday morning. For this purpose they assembled at the toolhouse, from which they procured their usual tools and a hand car. The time fixed for starting on these trips was 6:30 a. m. On the morning of said day Stalker left his home intending to go on the usual inspection trip. He took the cinder path at Franklin street and walked westward to a point in front of the toolhouse. Here he stopped and stood momentarily, looking to the west, and about one foot south of the south track. While in this position he was struck by the locomotive drawing said train, his body was hurled about eighty-five feet, and he was instantly killed. The train was running at the rate of thirty to forty miles per hour, which was its usual speed at that place. The locomotive could not see Stalker because the locomotive itself obstructed his view in that direction, especially when rounding the curve in the tracks. The fireman was shoveling coal into the fire box and had no opportunity to look ahead. It is customary when coming into a town for the fireman to keep a lookout, and he usually provides for the fire beforehand. The

coal furnished him on that morning was of very poor quality and that made it hard to keep up the fire. Under the company's rules it is the duty of a fireman, when not shoveling coal, to look ahead, and if he should see anybody on the track, it is his duty to inform the engineer, and thereupon it becomes the duty of the engineer to give the warning signal. The warning signal consists of a succession of short blasts of the whistle. The fireman knew that the train was running on the unusual track and against the current of traffic. He was unable to say whether any warning signal had been given, because he was busy with the fire, and he did not see anybody near the track or the toolhouse. The train ran to the station—a few rods west of the toolhouse—where it made the usual stop and then proceeded on its way. Neither the engineer nor the fireman knew of the accident until they were informed of it on their arrival at Chicago. As the train approached, the crossing signal was given at Greenwich street and also at Axe avenue, east of Franklin street, by two long and two short blasts of the locomotive whistle, but the whistle was not blown between Axe avenue and Franklin street. The bell on the locomotive was operated mechanically and it rang continuously from Greenwich street to the place of the accident. When the tower man observed the train approaching he set to ringing the electric gong on the iron post at Franklin street and it continued to ring until the accident. He lowered the gates, and the ratchet bell rang as the Franklin street gates went down. He rang the large bell in the tower, and on observing Stalker's perilous situation, he called to him. To all these warnings Stalker was oblivious.

A person with good hearing, standing where Stalker stood as the train approached, under all the conditions then existing, could have heard all said warning signals, except that he probably could not have heard the calling of the tower man because the train was then too close upon him. Stalker's hearing was good. He could have heard the locomotive bell in time to have moved to a place of safety. Had he looked to the east when the gates were being lowered at Franklin street, he could have seen the train approaching on the south track in time to have moved to a place of safety.

Some time after commencing his work as a section man his foreman warned him that trains were liable to run either way on either track and that he would have to pay diligent attention to the approach of trains from either direction on either track and to keep out of their way. In addition to this oral warning, the foreman gave him a pamphlet prepared by the safety committee and containing information, suggestions and advice, designed for the prevention of personal injuries to railway employes generally. The foreman told him to read the pamphlet and to govern himself thereby. He was able to read and he told his foreman that he would read it. Among other things, the pamphlet contained the following:

“Make it a rule in getting out of the way of trains to step clear of all tracks. Before stepping on any track look in both directions; trains may be expected on any track coming from either direction at any time.”

At the time of the accident there was in full force and effect an ordinance of the city of Valparaiso

which provided that no railway train should be run within the city limits at a higher rate of speed than ten miles per hour.

It is conceded by the parties that at the time of the accident decedent was engaged in interstate commerce. This action, then, is gov-

1. erned by the federal Employers' Liability Act of 1908, §8657 *et seq.* Comp. Stat. 1918, 35 Stat. at L. 65, and the amendments thereto, as to all matters within the purview of said act. We must accept the act as interpreted by the federal courts, and must accept also the law on this subject generally, as evidenced by the decisions of said courts. Since Congress has taken possession of the field of the employers' liability to employes in interstate transportation by rail, all state laws upon the subject are superseded. *Seaboard Air Line Railway v. Horton* (1913), 233 U. S. 492, 501, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C 1, Ann. Cas. 1915B 475.

Section 3 of said act, *supra*, declares that "the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe." Section 4, *supra*, declares that the "employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

The Supreme Court of the United States has held that, in abrogating the defense of assumption of risk in certain cases, Congress indicated the legislative intent that in all other cases assumption of risk shall have its former effect as a complete bar to the action.

Seaboard Air Line Railway v. Horton, supra; Jacobs v. Southern R. Co. (1915), 241 U. S. 229, 36 Sup. Ct. 588, 60 L. Ed. 970.

Appellant's first contention is that the trial court erred in overruling its motion for judgment on the interrogatories and answers notwithstanding

2. the general verdict. This contention is based exclusively on the ground that the facts disclosed by the interrogatories and answers compel the conclusion that the action is barred by the doctrine of assumption of risk. Assumption of risk is a substantive issue. It is not a matter of procedure nor a rule of evidence, and therefore the federal act and the decision of the United States Supreme Court constitute the substantive law on this subject; but the procedure is the established procedure prevailing in the courts of this state. *Minneapolis, etc., R. Co. v. Bombolis* (1915), 241 U. S. 211, 36 Sup. Ct. 595, 60 L. Ed. 961, L. R. A. 1917A 86, Ann. Cas. 1916E 505.

By the settled procedure of Indiana, whether the deceased assumed the risk of being injured or killed by appellant's train, in view of all the circum-

3. stances of the case, was a question for the jury under proper instructions. *Ambre v. Postal, etc., Cable Co.* (1908), 43 Ind. App. 47, 86 N. E. 871; *Rogers v. Leyden* (1891), 127 Ind. 50, 26 N. E. 210; *Annadall v. Union Cement, etc., Co.* (1905), 165 Ind. 110, 74 N. E. 893; *Central Vt. R. Co. v. White* (1915), 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B 252; *Gila Valley, etc., R. Co. v. Hall* (1914), 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521. As evidenced by their general verdict, the jurors decided that he did not assume that risk. In determining whether there is irreconcilable conflict between

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their general verdict and their answers to the

4. interrogatories we must indulge all legitimate inferences and presumptions in favor of the general verdict, and we may consider in support of the general verdict any fact provable under the issues and not included in the interrogatories and answers. *Pittsburgh, etc., R. Co. v. Lighthouse* (1906), 168 Ind. 438, 78 N. E. 1033; *Louisville, etc., R. Co. v. Creek* (1892), 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; *Catterson v. Hall* (1905), 37 Ind. App. 341, 76 N. E. 889; *Illinois Car, etc., Co. v. Brown* (1917), *ante* 315, 116 N. E. 4.

There is no contention that there was an express agreement whereby the employe assumed the risk of being injured or killed while in the course of his employment by any of appellant's trains. Were the circumstances such as compel the conclusion that the law will import into his contract of service a condition whereby he took upon himself the risk of being injured or killed in the manner disclosed by the interrogatories? 5 C. J. 1412. The general rule announced by the United States Supreme Court, when stated in language applicable to the case at bar, is as follows: An employe assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employe has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and is not to be treated as assuming the risk arising from a dangerous condition attributable to the employer's negligence, until the employe becomes aware of the danger or unless it is so plainly observable that he may be presumed to have known

it. Moreover, in order to charge an employe with the assumption of a risk attributable to the employer's negligence, it must appear, not only that he knew (or is presumed to have known) of the dangerous condition but that he knew that it endangered his safety; or else the danger must have been so obvious that an ordinarily prudent person, under the circumstances, would have appreciated it. If with this actual or constructive knowledge he remains in the service and encounters the danger he will be held to have assumed the risk. *Gila Valley, etc., R. Co. v. Hall, supra*, 101.

Counsel for the company say: "When he assumed a position near the track, he knew there was a liability of trains moving over that track at any time, and when he failed to look eastwardly, he assumed the risk, both of taking the position and the failure to properly exercise his faculties for his own protection."

But, manifestly, in determining whether the employe assumed the risk we should not confine our minds to the events of that morning. Being

5. contractual in its origin and nature, assumption of risk will not arise by implication of law from a perilous situation suddenly created. For the answer we are seeking, we must look to the pertinent events of his entire term of service.

When he entered the service his foreman warned him that trains were liable to run either way on either track at any time, and that he would have to

6. pay diligent attention to the approach of trains from either direction on either track in order to keep out of their way. But he was in the service for a period of eight months, and during that time approximately 13,000 trains ran over his section. Of

this number only one ran on the uncustomary track—adversely to the established custom; and the evidence does not show that he knew of that instance. It may be taken for granted that he had often seen No. 15 pass the tool house, and always on the north track. The regularity of this method of operating trains would tend naturally to lull him into a sense of security by inducing him to believe that there was little probability of trains running contrary to rule. In attempting an explanation of his conduct the thought naturally arises that he was influenced by the belief that the train was running on the north track—the track on which west-bound trains usually ran—and that he did not realize that the approaching train might be running, contrary to the established custom and against the current of traffic, on the south track—the track near which he stood. If he had realized this, it is reasonable to suppose that he would not have walked so near the track and that he would have been more alert. If we exclude the thought of suicide (and that we must do), we are forced to believe that he never appreciated the danger to which he was then exposed.

Was the danger so open and obvious that he ought to have appreciated it? Considering his knowledge of his working place, his experiences and his observations as to the running of trains on the respective tracks, the information and the warning given him as to the likelihood of trains running either way on either track at any time, and his opportunities for estimating the probabilities, ought he to have realized the danger that a perilous situation might arise at any time like that which did arise on that September morning? If so, ought he to have realized that dan-

ger long enough beforehand so that his remaining in the service thereafter would amount to an election to assume the risk? These questions must be answered in the negative. Manifestly the most that the law can impose upon him is a constructive appreciation of the danger involved in the possibility that trains might run either way on either track at any time—not the danger arising out of the identical conditions of that morning.

Was the dangerous condition of the employe's working place on that morning an abnormal one attributable to the negligence of the company's servants in charge of the train? The law imposed on them the duty to exercise reasonable care for the safety of persons on or near the track. The company imposed upon them the duty to look ahead when running within a town, and to give the danger signal if any person should be discovered in the path of the train. The engineer could not see Stalker because the locomotive itself obstructed his view in that direction; and the fireman, contrary to custom, was giving his undivided attention to his fire. Because they saw no one in a place of danger, no danger signal was given. Their train was running blindly, on the uncustomary track, in the central part of a city, and at a high and dangerous speed. Under these circumstances reasonable care may have required the frequent giving of the danger signal as a reasonable or necessary precaution—and precisely because they were unable to keep a lookout ahead. Even the ordinary crossing signal was not given as the train approached Franklin street. Now, we not only have the right, but it is our duty, to presume that, if the danger signal had been given, it would have aroused

Stalker to the danger in time to have avoided it. We presume, also, that if the train had been running at a moderate speed, the man in the tower would have succeeded in making Stalker hear his voice in time for him to have saved himself. And finally, we presume that Stalker had no intention to remain with his face to the west, but that in the natural order of things he was about to turn, or was in the act of turning, when the train struck him, and that he would have turned and saved himself had the train been running at a reasonable speed.

When he stopped at the edge of the south track he was facing the west and was looking in the direction which a proper regard for his safety required him to look before looking elsewhere. That he did not sooner face about and look also to the east, did not heed the blasts of the whistle, the ringing of the bells, the sounding of the gong and the lowering of the gates, and did not step quickly away from his perilous position in time to avoid the collision, are matters bearing on the subject of contributory negligence only.

Having considered all these elements, the jurors decided by their general verdict that the proximate cause of Stalker's death was the negligence of the employer's agents and servants in charge of the train—and that of itself negatives the proposition that he assumed the risk of being killed by that negligence. Under the facts of the case at bar, when negligence stepped in, assumption of risk stepped out; for it must be conceded that if the unfortunate employe ever appreciated the danger arising out of said negligence, he did not remain in the service thereafter. We find nothing in the interrogatories

and answers which is in fatal conflict with the general verdict. *Chesapeake, etc., R. Co. v. Proffitt* (1915), 241 U. S. 462, 36 Sup. Ct. 620, 60 L. Ed. 1102; *St. Louis, etc., R. Co. v. Brown* (1915), 241 U. S. 223, 36 Sup. Ct. 602, 60 L. Ed. 966; *Texas, etc., R. Co. v. Harvey* (1912), 228 U. S. 319, 33 Sup. Ct. 518, 57 L. Ed. 852.

(2) The court's charge to the jury is voluminous and constitutes seventeen pages of the transcript. It consists of thirty-six consecutively numbered paragraphs, and appellant contends that thirteen of these are erroneous.

The judge of the trial court stated in his own language the substance of the complaint. Following this he told the jurors, in effect, that where several

7. acts of negligence are sufficiently alleged in a complaint it is not essential to a recovery that all the alleged acts of negligence must be proved, but that a recovery may be justified if it is proved that the injury was the result of some one or more of the said acts of negligence. Appellant urges that this constitutes error.

In the case at bar it is not necessary that all the acts and omissions characterized as negligent must have concurred and combined to cause the injury. They are of such a nature that any one of them or any combination of them might be found to be the negligence which constituted the proximate cause of the injury. *Pittsburgh, etc., R. Co. v. Broderick* (1913), 56 Ind. App. 58, 71, 102 N. E. 887. When the complaint is considered as an entirety it becomes apparent that it presents but one theory of negligence, viz., the negligent running of the train by appellant's servants in charge thereof. The negligent acts and

omissions of these servants are specified with particularity as follows: (a) That they carelessly ran and operated said locomotive engine and train of cars at said point within the limits of said city at a highly dangerous rate of speed, to wit, at the rate of fifty miles per hour; (b) that they carelessly and negligently failed to maintain a lookout to see whether said decedent or anyone else was on, or in dangerous proximity to, said south track so that they might be warned of their danger; (c) that said engineer and other servants of the defendant in charge of said locomotive engine and train carelessly and negligently failed and omitted to give any signal or warning whatever of the fact that they were running westwardly on said eastbound track, whereby decedent, or anyone else in close proximity to said south main track, might have been apprised of the danger. These averments are followed by the general averment that the accident "was the result solely and entirely of the carelessness and negligence of the defendant and its engineer and other employes in charge of said locomotive engine and train of cars." True, there is in the complaint the averment "that said defendant carelessly and negligently failed to notify or inform said decedent of the fact that said train was running to the westward on the south main track." But this averment may not be considered as an independent and isolated statement, but must be considered in its relation to the entire complaint; and when so considered it is plain that it refers to the failure of the trainmen to warn decedent by giving appropriate danger signals; and in view of the instruction on this point the conclusion is inevitable that the jurors could not have been misled thereby.

We should not be justified in setting out all the instructions. Omitting those of a general character, and those of which no reasonable criticism can be made, the following present fully the real controversy as to the law of the case.

“14. The defendant owed the decedent no duty to run its west-bound train on its north main track nor on any particular schedule. It had the right to operate trains in either direction upon either track, and the decedent had no right to assume that the west-bound train would be operated upon the north main track. This would be true although the defendant usually and ordinarily did run its west-bound trains on said north main track.”

“19. If you find that the decedent's death was caused in part by the negligence of the defendant in some one or more of the particulars charged in the plaintiff's complaint and in part by the decedent's own negligence, your verdict should be for plaintiff, unless you further find that the decedent assumed the risk of the defendant's said negligence which so concurred in causing the decedent's death.”

“22. If the decedent knew that the defendant was liable at any time to run a west-bound train over the east-bound track, then he had no right to presume that the defendant would not so run a west-bound train over the east-bound track; and if he had such knowledge he would assume the risk of injury occasioned by the running of such train westwardly on the east-bound track in a reasonably careful manner; yet, under such circumstances, he would not assume the risk of the running of such train westwardly over the east-bound track in a negligent and careless manner.”

“24. I instruct you that if the employment upon which the plaintiff’s decedent entered for the defendant as one of its track men was one involving hazard or danger to the decedent from the operation of trains upon defendant’s railroad, then, as one of the terms of his employment, the decedent will be held in law to have assumed and taken upon himself the risk and hazard of injury to himself from those dangers that were ordinarily and usually incident to the employment in which he was engaged. Among the risks which he so assumed was the risk of injury by being struck by trains passing the place of his work on said railroad in either direction without notice and at any reasonable rate of speed, if said trains were operated in an ordinarily prudent manner.”

“25. The plaintiff’s decedent, George Stalker, assumed the ordinary risks incident to the service in which he was engaged, after the defendant had used care, diligence and caution for his safety and protection, commensurate with the danger to be reasonably apprehended from the service; and if the defendant failed to use such care and caution, and an injury resulted therefrom, it is not a risk incident to the employment, and the defendant is liable therefor, unless the danger is open and apparent or the decedent had actual knowledge thereof.”

“26. If the decedent, on the occasion of the injury, failed to obey any rule of the defendant of which he had notice, or any instruction given him by his superior in the defendant’s service, and such failure contributed to bring about his injury, it may be considered as bearing upon the question of decedent’s contributory negligence, but it would not be a defense to the right of the plaintiff to recover.”

“27. It was the duty of the decedent to exercise reasonable diligence to ascertain the rules, if any, promulgated by the defendant for his conduct while in its employment, and to acquaint himself with them; and the defendant had the legal right to promulgate rules for the conduct of its business and to require the decedent as one of its employes to conform thereto; and if such rules were promulgated and the decedent voluntarily failed or refused to conform or comply therewith, he will be held in law to have assumed all risk of injury occasioned by his failure to conform to such rules.”

“30. Under the law applicable to the issues and evidence in this case the decedent assumed all the ordinary risks incident to the service in which he was engaged and in addition he assumed the exceptional or extraordinary risks of which he had actual knowledge, or which were so plain and obvious that he must have known of them by casual observance. If you find from the evidence that the decedent knew that trains on defendant’s railroad might run over the uncusomary track at almost any time, he is presumed to have assumed whatever risks were incident to the mere running of the train that inflicted the injury, upon the uncusomary track at the time of the injury. The law provides that a railroad company shall be liable to a servant employed by it in interstate commerce for an injury inflicted upon him while so employed by the negligence of its officers, agents or servants while employed in interstate commerce and while in the line of duty. In this case the decedent did not assume the risks resulting from the negligence of the officers, agents or servants in charge of the train that inflicted the injury and caused the death

of decedent, if you find that there was such negligence, on the occasion of the injury, unless the decedent knew such negligence in time to avoid the injury.”

“31. If you find that the defendant for some time prior to the death of the decedent was accustomed to running its trains over its railroad within the city of Valparaiso at the point where decedent was injured at substantially as high a rate of speed as the train was running at the time it struck and killed the decedent, and that the decedent knew of such custom, or might have known of it by casual observance; and if you further find that such custom was confined to the tracks and the running of trains thereon in the usual manner, I instruct you that such custom does not necessarily establish the fact that decedent assumed the risk of running the train that inflicted the injury at the rate of speed, under the conditions and circumstances, that it was being run, at the time of the injury to him. * * *”

Appellant contends that Nos. 26 and 27 are conflicting; that the former is erroneous; and that the error in the giving of the former is not cured by the

8. giving of the latter, even though the latter be correct. These two instructions are not conflicting. When considered together it becomes apparent that No. 26 rests on the proposition that a mere failure to obey a rule—meaning thereby such a failure as results from forgetfulness, inattention, or carelessness—amounts to contributory negligence. This is a correct statement of the law; and the failure of an employe to obey a known rule promulgated for his safety will prevent a recovery in the absence of a statute eliminating contributory negligence as a

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defense in bar. 4 Thompson, Negligence §4624; *Atchison, etc., R. Co. v. Reesman* (1894), 60 Fed. 370; 9 C. C. A. 20, 23 L. R. A. 768; 18 R. C. L. 659. No. 27 is differentiated by the words “voluntarily failed or refused.” This instruction rests on the proposition that a voluntary violation of a rule—meaning thereby such a violation as is due to wilfulness, obstinacy, or stubbornness—amounts to *assumption of risk*. This is an inaccurate, or to say the least, an infelicitous, statement. The violation of a rule, whether due to thoughtlessness or wilfulness, goes to the question of negligence. *Gleason v. Detroit, etc., R. Co.* (1896), 73 Fed. 647, 19 C. C. A. 636; *Lake Erie, etc., R. Co. v. Craig* (1897), 80 Fed. 488, 25 C. C. A. 585. It may be that the voluntary violation of a rule ought to be something other than negligence, but certainly it cannot give rise to the concept known in law as *assumption of risk*. Furthermore, this instruction is not appropriate for the reason that the pamphlet introduced in evidence does not purport to be a “book of rules.” The so-called rules contained therein are not rules at all; that is to say, they were not promulgated by the company as positive and peremptory rules or regulations for the purpose of controlling the conduct of its employes, or defining their duties, or fixing the scope of their employment. They are mere suggestions and warnings intended to aid the employes in looking out for their own safety by the exercise of judgment, skill, and diligence; and a failure to observe them is not negligence *per se*.

9. *Lake Shore, etc., R. Co. v. Parker* (1890), 131 Ill. 557, 23 N. E. 237. But the error in the giving of instruction No. 27 is favorable to appellant and

harmful to appellee, and appellant cannot be heard to complain thereof.

We shall not enter upon a further detailed discussion of these instructions. We deem it sufficient to say that they fairly state the law applicable to the facts of the case, and that appellant's criticisms are not well taken. *Shields v. State* (1897), 149 Ind. 395, 406, 49 N. E. 351; *Vandalia R. Co. v. Stevens* (1918), ante 238, 114 N. E. 1001, 1008; *Chicago, etc., R. Co. v. Lake County Savings, etc., Co.* (1917), 186 Ind. 358, 114 N. E. 454; §700 Burns 1914, §658 R. S. 1881.

There is some confusion in the instructions with respect to assumption of risk and contributory negligence; but the inaccurate statements in this regard are all favorable to appellant.

Appellant insists that the court erred in rejecting eighteen of the forty-one instructions tendered. One

of these rejected instructions is in the following language: "38. Certain provisions of an ordinance of the city of Valparaiso have been introduced in evidence on the trial of this cause. I now instruct you that these provisions of such ordinance are not to be considered by you for any purpose, and they are withdrawn from your consideration."

The provisions of the ordinance to which said rejected instruction refers, are the following:

"Section 79. It shall be unlawful for any person having control of any engine or train of cars on any railroad running within the limits of said city, to run such engine or train of cars at any point within the said city at a greater rate of speed than ten miles per hour."

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“Section 89. Any person or persons who shall violate any of the provisions of this ordinance, to which a special penalty has not been affixed, shall, upon conviction thereof, forfeit and pay to the city for every such offense, any sum not exceeding fifty dollars.”

Appellant contends that the refusal to give said instruction No. 38 is error, for the reason that since this action is under the federal statute all state laws and municipal ordinances are excluded from consideration. We cannot sustain the contention in this sense. The federal statute declares that employers within its scope shall be liable to their employes for negligence. It does not specify what shall constitute negligence, but leaves that question to be determined in accordance with the established rules of the law of that subject. The ordinance does not undertake to regulate interstate commerce or to create any civil liability against the railway company. It is merely a reasonable exercise of the police power and is designed to promote the safety of persons and property which would be jeopardized by the running of trains at a dangerous speed within the municipality. We have not been advised that this point has been specifically decided by any federal court; but we are of the opinion that, on principle, such an ordinance ought to be considered as bearing on the question of negligence. *Hennington v. Georgia* (1895), 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; *Employers' Liability Cases* (1911), 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Lake Shore, etc., R. Co. v. Ohio* (1898), 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; *Austin v. Tennessee* (1900), 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224; *Sligh v. Kirkwood*

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(1914), 237 U. S. 52, 62, 35 Sup. Ct. 501, 59 L. Ed. 835; *Whitson v. City of Franklin* (1870), 34 Ind. 392; *Cleveland, etc., R. Co. v. Harrington* (1892), 131 Ind. 426, 30 N. E. 37; *Chicago, etc., R. Co. v. Spilker* (1893), 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; *Shirk v. Wabash R. Co.* (1895), 14 Ind. App. 126, 42 N. E. 656; *Pennsylvania Co. v. Horton* (1892), 132 Ind. 189, 31 N. E. 45.

We may dispose of all the other rejected instructions by saying that, in so far as they state the law correctly, they are covered by the instructions given.

Judgment affirmed.

NOTE.—Reported in 119 N. E. 163. Master and servant: assumption of risk under federal Employers' Liability Act, Ann. Cas. 1915B 481; operation and effect of federal act, generally, 48 L. R. A. N. S.) 987, L. R. A. 1915C 49; assumption of risk arising after commencement of employment, 3 Ann. Cas. 814. Railroads, running train on wrong or unusual track as negligence, Ann. Cas. 1917A 936. See under (1) 12 C. J. 17; (2) 26 Cyc 1180; (5) 26 Cyc 1177.

SHOWERS ET AL. v. GOODMAN.

[No. 10,207. Filed April 8, 1918.]

1. APPEAL.—*Dismissal.—Landlord and Tenant.*—Where a judgment permanently enjoined the defendants from interfering with the plaintiff's possession of real estate so long as the latter complied with his lease, and decreed that the injunction should terminate in the event of the mutual agreement of the parties, an appeal therefrom will be dismissed where, prior to the perfection of the appeal, the tenancy was terminated by mutual consent, possession of the premises having been surrendered by the plaintiff and accepted by the defendants. p. 354.
2. APPEAL.—*Decisions Reviewable.—Moot Question.*—Where the plaintiff remitted the amount recovered in an injunction suit, leaving only the judgment for costs, and the record shows that

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the injunction had been terminated by mutual consent of the parties before the appeal was perfected, the court on appeal will not review the questions presented to determine the matter of costs. p. 354.

3. **APPEAL.—Estoppel to Allege Error.—Accepting Benefits.**—The acceptance of rent by a landlord for the occupancy of real estate for periods both before and after the rendition of a judgment permanently enjoining interference with the tenancy amounted to an acknowledgment of the tenancy and of the legality of the judgment, and estops such landlord from asserting on appeal that the judgment is erroneous. p. 355.

From Shelby Circuit Court; *Alonzo Blair*, Judge.

Suit by Abraham Goodman against Julius L. Showers and another. From a judgment for the plaintiff, the defendants appeal. *Affirmed*.

A. E. Lisher and *Isaac Carter*, for appellants.

Hall & Pell, for appellee.

IBACH, C. J.—Appellee was a tenant of appellants, and brought this suit to enjoin appellants from ousting him from the premises rented and for damages. On his verified petition a temporary restraining order was issued against appellants “until the further order of the court.” Upon final hearing on March 4, 1916, the court made a special finding of facts, and stated conclusions of law thereon. The temporary restraining order was made permanent, and appellants were enjoined from interfering with appellee’s possession of the building and premises in dispute so long as appellee complied with the terms of a certain lease under which he was in possession and occupying the said premises. The decree also provided that the injunction should terminate and be at an end in the event that appellants and appellee should mutually terminate the tenancy, and in the event of its termination by law, and appellee was given judg-

ment for one dollar damages and costs. It is from this judgment that appellants have appealed.

We are first met with a motion to dismiss the appeal, alleging as grounds therefor that the controversy between the parties has been settled, and the questions presented by the appeal have thereby become moot; also, for the further reason that appellants, prior to appealing the cause, accepted benefits under the decree of the court, and recognized the rights of appellee as determined by the judgment of the lower court.

The motion and affidavit of appellee, which is not contested by appellants, show that the tenancy over which the litigation arose has been by the par-

1. ties mutually terminated, the premises surrendered by appellee, and that appellants have taken full possession thereof; that appellee has not had, or made, any claim for possession of the store-room in question since September 25, 1916, long before taking of this appeal. It is clear, therefore, that before perfecting the appeal the parties did, by virtue of the decree of the court, terminate the injunction granted by mutual consent and agreement of the parties.

It is further made to appear that appellee has remitted the judgment of one dollar; therefore there was no judgment in fact when this appeal was

2. taken, except the judgment for costs. We are informed also that appellee continued to occupy the premises from the date of the final judgment until September 25, 1916, and paid, and appellants accepted, as rent therefor the sum of \$392, being rent at the leased price from December 25, 1915, until the date aforesaid, when possession of the premises was

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surrendered by him and accepted by appellants. These facts, which, as we have said, are not controverted, require a dismissal of the appeal. The questions presented by the record have become moot propositions of law, and will not be considered and determined by this court simply to decide the question of costs. *Leavell v. Doney* (1913), 181 Ind. 481, 104 N. E. 856, and cases cited.

Furthermore, by accepting and collecting rents from appellee according to the terms of the original lease for the time rent was unpaid before, and

3. for the occupancy of the premises after, final judgment, appellants acknowledged appellee as their tenant and acknowledged the legality of the judgment of the trial court, and must now be held to be estopped to claim that such judgment is erroneous. *Williams v. Richards* (1898), 152 Ind. 528, 53 N. E. 765; *McGrew v. Grayston* (1896), 144 Ind. 165, 41 N. E. 1027; *Scott v. Dilley* (1912), 53 Ind. App. 100, 101 N. E. 313

Appeal dismissed.

NOTE.—Reported in 119 N. E. 219.

FAYLOR ET AL. v. KOONTZ ET AL.

[No. 9,819. Filed February 23, 1917. Rehearing denied June 22, 1917. Transfer denied April 9, 1918.]

1. **APPEAL.—Decisions Reviewable.**—"Final Judgment."—A final judgment, within the meaning of §671 Burns 1914, §632 R. S. 1881, is one that at once disposes of all the issues, as to all the parties, involved in the controversy presented by the pleadings, to the full extent of the power of the court to dispose of them,

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and puts an end to the particular case as to all the parties and all the issues. p. 357.

2. **APPEAL.—Decisions Reviewable.**—“*Final Judgment.*”—A judgment against the cross-complainants rendered on a motion to strike out their cross-complaint, though it disposes of all the issues as to all the defendants thereto, is not a final judgment, within the meaning of §671 Burns 1914, §632 R. S. 1881; the ruling on such motion and the judgment thereon are but steps in making up the issues, and any error committed in so doing may be presented and determined on an appeal after final judgment affecting all the issues and all the parties. pp. 358, 359.
3. **APPEAL.—Judgment for Costs.**—“*Final Judgment.*”—A judgment, entered on a motion to strike out a cross-complaint, which did not dispose of all the issues as to all the parties, was not rendered appealable, under §671 Burns 1914, §632 R. S. 1881, by the inclusion of an award of costs as a part thereof, since the award of costs, being but an incident to the action, adds nothing to the merit of the appeal. p. 359.

From Wells Circuit Court; *Wilson D. Lett*, Special Judge.

Action by Susannah Koontz and others against Kate Faylor and others. From a judgment dismissing a cross-complaint, Kate Faylor and others appeal. *Dismissed.*

Mock & Mock, for appellants.

Simmons & Dailey and *Sturgis & Stine*, for appellees.

BATMAN, J.—In this cause appellees have filed their motion to dismiss the appeal on the ground that no final judgment has been rendered, as required by §671 Burns 1914, §632 R. S. 1881, and hence an appeal is unauthorized.

It appears that on November 2, 1914, part of the appellees filed a complaint in the Wells Circuit Court, making appellants, David D. Studabaker, Henry C. Arnold and others defendants. On April 17, 1916,

appellants filed their answer to such complaint and also their cross-complaint against the plaintiffs, a part of their codefendants and certain new parties. On October 4, 1916, the appellees who were plaintiffs below, and the appellees who were made new parties by said cross-complaint of appellants, filed motions to strike out such cross-complaint, which motions were sustained and exceptions were reserved by appellants to the ruling on each of such motions. The court thereupon rendered the following judgment: "It is therefore considered and adjudged by the court that the cross-complainants take nothing by their cross-complaint herein, and that the plaintiffs and their codefendants, Abram Simmons, Frank C. Dailey, Charles E. Sturgis, and Robert W. Stine, recover of said cross-complainants, Kate Faylor and Maggie Strickler, their costs herein expended upon the proceedings had in the matter of said cross-complaint." From this judgment appellants are prosecuting this appeal.

The sole question raised by appellees on their motion to dismiss is whether such judgment is a final judgment within the meaning of §671, *supra*.

1. It is now well settled by the repeated decisions of the courts of this state that a final judgment within the meaning of such section is one "that at once disposes of all the issues, as to all parties, involved in the controversy presented by the pleadings, to the full extent of the power of the court to dispose of the same, and puts an end to the particular case as to all of such parties and all of such issues." *Wehmeier v. Mercantile Banking Co.* (1911), 49 Ind. App. 454, 97 N. E. 558; *Rife v. Diamond Flint Glass Co.*

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(1908), 42 Ind. App. 346, 85 N. E. 726; *Daegling v. Strauss* (1915), 59 Ind. App. 672, 109 N. E. 920; *Foote v. Foote* (1913), 53 Ind. App. 673, 102 N. E. 393; *Northern, etc., Cable Co. v. Peoples Mut. Tel. Co.* (1915), 184 Ind. 267, 111 N. E. 4. If the judgment in question is such a judgment, then the motion must be overruled, otherwise it ought to be sustained.

There are many decisions in this state to the effect that where the issues tendered by a complaint or a cross-complaint are disposed of as to a part of the defendants thereto, but remain undisposed of as to other defendants, an appeal will not lie as to any of such defendants until the rendition of a final judgment as to all the parties and all the issues. *American Fidelity Co. v. East Ohio, etc., Co.* (1912), (Ind. App.) 101 N. E. 101; *id.* 53 Ind. App. 335, 101 N. E. 671; *Hopp v. Luken* (1909), 44 Ind. App. 568, 89 N. E. 916; *Daegling v. Strauss, supra*; *Rife v. Diamond Flint Glass Co., supra*.

However, we have not been able to find any decision in this state with reference to the right of appeal

when the ruling of the court on a cross-complaint disposes of the issues tendered as to all the defendants thereto. The authorities in other jurisdictions are not uniform on this question, but the better reason and the greater weight leads to the conclusion that an appeal from such a judgment is not authorized. *Stockton, etc., Works v. Glen's Falls Ins. Co.* (1893), 98 Cal. 557, 33 Pac. 633; *Lawrence v. Paden* (1897), 76 Ill. App. 510; *French v. Bellows Falls Savings Institution* (1896), 67 Ill. App. 179; *Howard v. Boyd* (1896), 67 Ill. App. 572; *Emery v. Central Trust, etc., Co.* (1913), 204 Fed. 965, 123

C. C. A. 287; *Aston v. Dodson* (1909), 161 Ala. 518, 49 South. 856.

Appellants contend that their cross-complaint constituted a distinct and separate branch of the case, and that the judgment against them, following the motion to strike out their cross-complaint, was a final judgment within the meaning of §671, *supra*, and therefore one from which an appeal could be taken. The following authorities are against such contention. *Treadway v. Coe* (1851), 21 Conn. 282; *Ayres v. Carver* (1854), 17 How. 591, 15 L. Ed. 179; *Ex parte Railroad Co.* (1877), 95 U. S. 221, 24 L. Ed. 355.

The ruling on such motion to strike out and the judgment entered thereon are but steps in making up the issues in the cause, and any error commit-

2. ted in so doing can be presented and determined on an appeal taken after a final judgment as to all the issues and all the parties, and no harm can result by reason of any attendant delay. *Frankfort Construction Co. v. Sims* (1916), 185 Ind. 71, 113 N. E. 298.

The fact that such judgment included a recovery of costs from appellants can add nothing to the merit of the appeal, since it has been expressly held

3. that costs are regarded as but an incident to a suit, and the fact that they are awarded cannot serve to render a judgment final, so as to bring in the revisory power of an appellate tribunal, in the absence of a determination of the principal controversy in its entirety. *Mak-Saw-Ba Club v. Coffin* (1907), 169 Ind. 204, 82 N. E. 461.

It is apparent from the record that such judgment did not dispose of all the issues in the case as to all the parties, as required by the authorities first cited,

supra, as it left undetermined the issues made by appellants in filing their answer to the complaint, not to mention any other issue raised by the other defendants to such complaint. Nor did it in any manner dispose of such case, but left it open for final trial and judgment as to all original defendants, including appellants, on such remaining issues. We therefore conclude that such judgment was not a final judgment within the meaning of the statute authorizing appeals. To hold otherwise would permit appeals to be taken by all defendants, during the pendency of an action, who receive adverse rulings at the hands of the court on which judgments are rendered prior to final judgment and thus result in appealing a case by piecemeal. This the law will not permit, as it would defeat one of the principal objects of the statute in question. *Barnes v. Wagener* (1907), 169 Ind. 511, 82 N. E. 1037; *Hopp v. Luken*, *supra*; *Daegling v. Strauss*, *supra*.

In view of the fact that it is the policy of the law to prevent multiplicity of suits, and likewise multiplicity of appeals, as far as reasonably possible, with due regard for the rights of litigants, we are convinced that the conclusion we have reached is the correct one, since appellants' rights would not be jeopardized by abiding the final termination of the proceedings as to all the parties and all the issues, as any error committed in striking out their cross-complaint could be reviewed on an appeal taken after such final judgment.

Motion sustained, and appeal dismissed.

NOTE.—Reported in 115 N. E. 95. See under (1) 3 C. J. 441; (2) 3 C. J. 492.

EADS V. KUMLEY ET AL.

[No. 9,500. Filed April 9, 1918.]

1. **APPEAL.—Assignments of Error.—Reversible Error.—Highways.—Obstruction.—Collateral Attack.**—Assuming that a complaint to enjoin the obstruction of a highway shows on its face that it is a collateral attack on a judgment of the board of commissioners, such fact is not controlling in determining whether reversible error is presented by assignments that the trial court had no jurisdiction of the subject-matter or of the person of the defendant, and that the complaint did not state facts sufficient to constitute a cause of action. p. 363.
2. **APPEAL.—Presenting Questions.—Waiver.**—An assignment of error that the complaint does not state sufficient facts to constitute a cause of action presents no question for review, in view of Acts 1911 p. 415, §348 Burns 1914. p. 363.
3. **HIGHWAYS.—Obstruction.—Injunction.—Jurisdiction.—Collateral Attack.**—The circuit court, being a court of general jurisdiction, had jurisdiction of the subject-matter of an action to enjoin the obstruction of a highway; hence, an assignment that the court had no jurisdiction of such action, because it was a collateral attack on a judgment of the board of commissioners, is of no avail, since the court, having jurisdiction of the subject-matter, could properly assume jurisdiction, if for no other reason, to determine whether the action was in fact a collateral attack on such judgment. p. 363.
4. **HIGHWAYS.—Establishment.—Power of Board.**—The board of commissioners, in the establishment of highways, has only such powers as are conferred by statute, and these powers must be employed substantially in the manner prescribed to render the proceedings valid. p. 367.
5. **HIGHWAYS.—Vacation.—Judgment.—Collateral Attack.—Complaint.**—A complaint, in a suit to enjoin the obstruction of a highway, which, in addition to a general allegation that the defendant acted on a void order of the board of commissioners in obstructing such highway, set forth the petition filed with such board, which petition was signed by only one petitioner instead of twelve as required by §7649 Burns 1914, Acts 1905 p. 521, sufficiently showed that the judgment of the board was void and, therefore, subject to collateral attack. p. 368.
6. **HIGHWAYS.—Enjoining Obstruction.—Complaint.—Sufficiency.—Harmless Error.**—In a suit to enjoin the obstruction of a high-

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way brought by parties owning land abutting on such highway, a complaint failing to allege that any part thereof along the plaintiffs' lands was obstructed or that access to such lands was substantially interfered with, but alleged only such damages as those suffered by the public generally, was insufficient; and the overruling of a demurrer to such complaint will not be treated as harmless where the evidence showed damages different only in degree from those sustained by the public generally. pp. 368, 369.

7. NUISANCE.—*Public Nuisance.—Injunction.—Complaint.—Sufficiency.*—In order for an individual to successfully maintain a suit to enjoin the creation or maintenance of a public nuisance, he must show that he sustains a particular or peculiar injury different in kind from that sustained by the public generally. p. 368.

8. HIGHWAYS.—*Obstruction.—Injunction.—Joinder of Parties.*—Parties owning separate tracts of realty could not properly be joined in an action to restrain the obstruction of a highway solely on the ground that both tracts abutted on the highway. p. 370.

From Wabash Circuit Court; *Nelson G. Hunter*, Special Judge.

Suit by Jacob Kumley and others against John W. Eads. From a judgment for the plaintiffs, the defendant appeals. *Reversed.*

Alvah Taylor and *Fletcher A. Payne*, for appellant.
Plummer, Todd & Plummer, for appellees.

HOTTEL, J.—This is an appeal from a judgment by which appellant was perpetually enjoined from obstructing a certain highway in Wabash county, and was ordered to remove certain obstructions therein. There was also a judgment in favor of appellees and against appellant for five dollars damages and costs of the action.

The errors assigned by appellant and relied on for reversal are as follows: (1) The trial court had no jurisdiction of the subject-matter or of the person of

appellant; (2) the appellees' complaint does not state facts sufficient to constitute a cause of action; (3) the court erred in overruling appellant's demurrer to appellees' complaint; (4) the court erred in overruling appellant's motion to make the complaint more specific; (5, 6) the court erred in sustaining appellees' demurrer to appellant's second and third paragraphs of answer respectively; (7) the court erred in overruling appellant's motion for a new trial.

Appellant, in his points and authorities, groups under one head the first three assigned errors, *supra*, and in support of his contention that each as-

1. signment presents reversible error insists in effect that the complaint shows upon its face that the action is a collateral attack upon the judgment of the board of commissioners. Assuming that this is true, such fact is not of controlling influence in the determination of the question whether reversible error is presented by either the first or second assignments, *supra*.

The second assigned error presents no question for review. §348 Burns 1914, Acts 1911 p. 415;

2. *Hedekin Land, etc., Co. v. Campbell* (1915), 184 Ind. 643, 112 N. E. 97.

No ground or reason is pointed out or suggested by appellant in his briefs in support of that part of his first assigned error which challenges

3. the jurisdiction of the trial court over his person; and, as to that element of said assignment which challenges the jurisdiction of the trial court over the subject-matter of the action, it is sufficient to say that such court is a court of general jurisdiction, and hence has jurisdiction of an action to enjoin the obstruction of a public

highway. Assuming, therefore, without so deciding that this action is a collateral attack upon the judgment of the board of commissioners of Wabash county, the trial court nevertheless had jurisdiction of the subject-matter of the action, and appellant's contention necessarily presupposes that the assumption of such jurisdiction was proper and necessary, at least for the purpose, if for no other, of determining whether the action was in fact a collateral attack upon the judgment of said board of commissioners.

• This brings us to a consideration of the third assigned error.

• Appellees' complaint alleges substantially the following facts: Appellees are "each severally" the owners of tracts of land abutting on a certain highway running diagonally through section 26, township 28 north, range 7 east, in Wabash county, which is now and has been for more than thirty-five years last past an open public highway, and used generally by the public. A part of said highway runs through appellant's real estate. On October 6, 1914, appellant filed a petition with the board of commissioners of Wabash county, in which he asked for a change in the location of that part of the highway therein described as being upon his land. Said petition is set out in full in the complaint, and contains a description of appellant's land over which that part of said highway sought to be changed passes and a description of such part of said highway as located at the time and as it would be located by the proposed change, etc. The complaint then sets out in detail the proceedings had before said board in the matter of said petition, showing the appointment and report of viewers, and the approval thereof by said board, from

which it appears that said viewers reported favorably to the change of said highway as asked in said petition, and recommended that the proposed highway be established before the vacation of the existing highway, all as contemplated by §7665 *et seq.* Burns 1914, Acts 1905 p. 521, §17. It is then averred that on March 2, 1915, appellant filed a second petition with said board, and that in it he asked for a vacation of all that part of said highway which passed through his land. This petition is also set out in the complaint and appears to be signed by appellant alone.

The complaint then alleges facts substantially as follows: Appellant at the time of his filing said petition made proof of the posting of notices of such filing, and said board thereupon appointed three viewers. On April 6, 1915, such viewers filed their report and thereupon said board entered an order vacating said highway. The highway described in each petition is the same and is described as running diagonally through appellant's land, said land being described in each of said petitions. In said first petition appellant sought on his own petition to have the course of said highway changed or relocated on his said land, but did not seek or demand that it be vacated. In his said second petition appellant sought to have vacated part of said highway additional to that part sought to be changed in the first petition. Appellant was the only landowner who signed said second petition. The change ordered on said first petition has never been made, and no improvement has been made of the changed portion of said highway, and nothing done to establish it so that the public can travel thereon. Acting upon said last-mentioned order of the board, appellant has closed

the road running through his land and described in said second petition, and the public is prevented from using said highway. As now obstructed, such highway ends at the west line of appellant's land; and if said appellant is permitted to maintain an obstruction in said highway and keep the same closed, the public and appellees will not be able to travel as it has traveled across said section for the past thirty-five years. Appellant threatens to, and, unless enjoined, he will, plow up and destroy such old road on his land. The order of said board on said second petition is wholly illegal and void, for the reason that said petition was not signed by twelve freeholders, six of whom reside in the immediate vicinity of the road sought to be vacated thereby, and said board never acquired any jurisdiction whatever over the subject-matter of such petition and acted without authority. Appellant's acts in closing said road have damaged appellees "by reason of their being unable to travel such road" in the sum of \$500.

As before indicated, appellant contends that the complaint is a collateral attack upon a judgment of the board of commissioners. Its averments show no attack on the judgment of the board on the first petition, but, on the contrary, the complaint proceeds upon the theory that such judgment was valid, that it was never complied with by appellant, and hence that it does not authorize said obstruction of the highway. Appellant, however, bases his contention apparently upon the validity of the second order of the board. He insists that the assumption of jurisdiction and the order made by the board shows that it adjudged the second petition to be sufficient and regular, and that,

as appellees did not appeal directly from such order, they cannot now attack it collaterally.

The complaint avers, and such second petition therein set out shows, that the board's order vacating the highway alleged to be obstructed was made upon a petition for the *vacation* of a highway which was signed by appellant only. The act providing for the vacation of highways that are wholly within the county (§7649 Burns 1914, Acts 1905 p. 521) provides: "That whenever twelve freeholders of the county, six of whom shall reside in the immediate neighborhood of the highway proposed to be * * * vacated * * * shall petition the board of commissioners of such county for the * * * vacation * * * thereof, such board if satisfied that said petition has been filed with the county auditor * * * shall appoint three disinterested freeholders * * * to view said highway."

The board of commissioners has only such powers as are conferred upon it by statute, and these powers it must employ in the mode prescribed. *Doctor*

4. *v. Hartman* (1881), 74 Ind. 221; *Helms v. Bell* (1900), 155 Ind. 502, 504, 58 N. E. 707. The board has power to establish highways, but the conditions and manner of its exercise are clearly defined by the statutes, and must be substantially observed, or the proceeding becomes a nullity. *Hudson v. Voreis* (1893), 134 Ind. 642, 34 N. E. 503; *Strong v. Makeever* (1885), 102 Ind. 578, 581, 1 N. E. 502, 4 N. E. 11; *Helms v. Bell*, *supra*.

The board has power to appoint viewers and further to proceed in the matter of vacating such highway only as provided in said §7649 *et seq.*, viz., "whenever twelve freeholders, six of whom shall re-

side in the immediate neighborhood of the highway proposed to be vacated shall petition the board" for the vacation thereof.

It is also provided that "such board if satisfied that *said* petition has been filed * * * shall appoint" viewers, etc. The act, then, of the board in appointing viewers, and in making the order upon their report, is conclusive, as against collateral attack, as to the sufficiency of the petition, unless it appears by the record that such petition is not sufficient. *Waugh v. Board, etc.* (1916), 64 Ind. App. 123, 115 N. E. 356, and cases cited; *Pittsburgh, etc., R. Co. v. Gregg* (1913), 181 Ind. 42, 102 N. E. 961, and cases cited.

But here the complaint not only contains the general averment by way of conclusion that appellant, acting upon a void order of said board, ob-
5. structed a public highway, but it sets out the petition filed with said board, and it shows that it was signed by appellant only, and was not the petition of twelve freeholders of the county. It is therefore apparent from the complaint that the petition filed was not such as the statute requires, and hence it did not give the board power to act in the vacation of said highway. In such case, the board's judgment was void, and may be successfully attacked collaterally.

Appellant also challenges the sufficiency of the complaint on the ground that it does not show that appellees sustained damages from such obstruction

6. different in kind from those sustained by the public generally. This principle contended for by appellant is well established, viz., that the
7. individual cannot enjoin the creation or maintenance of a public nuisance, or recover dam-

ages therefor, unless he shows that he sustains thereby some particular or peculiar injury different from that sustained by the public generally, and not common to it. That the individual's injury is greater than that of the public is not enough; it must differ in kind and not merely in degree. *Tate v. Ohio, etc., R. Co.* (1856), 7 Ind. 479; *McCowan v. Whitesides* (1869), 31 Ind. 235; *Indiana, etc., R. Co. v. Eberle* (1887), 110 Ind. 542, 11 N. E. 467, 59 Am. Rep. 225; *Decker v. Evansville, etc., R. Co.* (1893), 133 Ind. 493, 33 N. E. 349; *Dantzer v. Indianapolis Union R. Co.* (1894), 141 Ind. 604, 39 N. E. 223, 34 L. R. A. 769, 50 Am. St. 343; *Pittsburgh, etc., R. Co. v. Noftsgar* (1897), 148 Ind. 101, 47 N. E. 332; *Lowe v. City of Lawrenceburg* (1912), 177 Ind. 629, 630, 631, 98 N. E. 637, and cases cited; *Spurrier v. Vater* (1916), 62 Ind. App. 669, 673, 113 N. E. 732.

The only averments of the complaint on this question of damages allege that appellees owned tracts of land abutting on the highway in question; that appellant has closed the road running through *his land*; that the public is prevented from using such highway; that if appellant be permitted to maintain the obstruction of the highway *the public and appellees* will not be able to travel across said section as *it* has done for the past thirty-five or forty years; and that the acts of appellant have damaged appellees *by reason of their being unable to travel such road*, in the sum of \$500.

It is apparent that the only damages alleged to have been sustained by appellees are the same in kind as those sustained by the public, viz., those resulting from their being unable to travel upon such road. While it is alleged that appellees

owned lands abutting on this highway, it is not alleged that any part of the highway upon which their lands abut was obstructed, but, on the contrary, it appears from the complaint that the part obstructed was wholly within the appellant's land. Nor does it appear from the complaint that the access to appellees' lands was substantially interfered with. The fact that appellees' lands abutted on the highway is not enough, of itself, to show special damages to appellees, but the obstruction must be upon a part of the highway, the fee in which is owned by the abutting owner, or the obstruction must interfere substantially with access to the abutting land. *Tate v. Ohio, etc., R. Co., supra; Indiana, etc., R. Co. v. Eberle, supra; Decker v. Evansville, etc., R. Co., supra*, 496, 497; *Dantzer v. Indianapolis Union R. Co., supra; Pittsburgh, etc., R. Co. v. Noftsgger, supra*, 108.

We might add in this connection that we have examined the evidence, and that it also fails to show that appellees sustained any damage different in kind from that sustained by the general public. It thus appears that the case was tried and determined upon the theory that if appellees showed that they sustained damages, from the obstruction of said highway, different in degree only from those sustained by the public generally, they might recover. It follows that this court cannot say that it can treat the ruling on said demurrer as harmless, or treat the complaint as amended to correspond with the evidence.

There is another infirmity in the complaint not raised by the memorandum filed with the demurrer or referred to in the briefs, but inasmuch as

8. the judgment below must be reversed because of other defects in the complaint, we deem it

proper to call attention also to such other infirmity. The complaint apparently proceeds upon the theory of a joint action by both appellees, and the judgment is a joint judgment in their favor for five dollars damages. There is nothing, however, in the averments to the complaint or in the evidence which shows such joint right of action. Nothing appears in the complaint or in the evidence which shows that they jointly owned any real estate abutting on said highway, but, on the contrary, the complaint avers, and the proof shows, that they owned separate tracts of land abutting on such highway, and that their rights of action, and damages, if any, resulting from the obstruction of said highway were separate and independent.

For the reasons indicated, the judgment below is reversed with leave to appellees to amend their complaint if they so desire, and for such other proceedings as may be consistent with this opinion.

NOTE.—Reported in 119 N. E. 219. Nuisance: right of a private individual to abatement of nuisance consisting of obstruction in highway preventing or interfering with access to his property, 11 Ann. Cas. 287. See under (1) 3 C. J. 1366; (5) 37, Cyc 189; (7, 9) 37 Cyc 255.

LITTLE v. HOFFMAN.

[No. 9,576. Filed April 10, 1918.]

1. LANDLORD AND TENANT.—*Action for Possession.—Complaint.—Sufficiency.—Jurisdiction.*—In a landlord's action for possession, a complaint describing the real estate as being in Indianapolis, Indiana, sufficiently showed that it was located in Marion county, so that a justice of the peace of such county had jurisdiction under

Little v. Hoffman—67 Ind. App. 371.

§8071 Burns 1914, §5225 R. S. 1881, providing that in such actions only a justice of the peace of the county in which the lands are situated shall have jurisdiction. pp. 373, 374.

2. **JUSTICES OF THE PEACE.—Appeals.—When Jurisdiction Is Conferred.**—If a court of a justice of the peace does not have jurisdiction of the subject-matter of a cause commenced therein, a circuit court does not acquire jurisdiction on appeal. p. 373.
3. **APPEAL.—Review.—Harmless Error.—Absence of Allegations from Complaint.**—Where defendant in an action to recover possession of real estate alleged in his answer that the property involved was situated in Marion county, Indiana, he was not deceived or misled by the absence from the complaint of an allegation specifically locating the property in such county. p. 374.
4. **APPEAL.—Review.—Complaint.—Sufficiency.—Absence of Evidence from Record.—Presumption.**—The evidence not being in the record, it should be assumed on appeal that certain informalities and uncertainties in the land description contained in a complaint to recover possession were removed by the evidence. p. 374.
5. **PLEADING.—Matters of Judicial Knowledge.—Statute.**—Under §363 Burns 1914, §374 R. S. 1881, providing that matters of which courts take judicial notice need not be pleaded, where a complaint to recover possession of real estate showed that the property involved was located in Indianapolis, it was unnecessary to allege that it was in Marion county, Indiana, since the courts will take judicial notice that the city of Indianapolis is located in that county. p. 374.

From Marion Circuit Court (25,668); *Linn D. Hay*, Special Judge.

Action by Alva R. Hoffman against James Burdette Little. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

J. Burdette Little, Edwin Steers and Charles Mendenhall, for appellant.

Austin F. Denny, for appellee.

CALDWELL, J.—Appellee as landlord brought this action before a justice of the peace of Marion county to recover from appellant, alleged to be a tenant unlawfully holding over, the possession of certain real

estate, and damages for its detention. A trial in the circuit court on appeal resulted in a judgment in favor of appellee for the possession of the real estate and damages.

Appellant urges that it does not appear that the justice of the peace, and consequently that the circuit court on appeal, had jurisdiction over the sub-

1. ject-matter of the action. Appellant's propositions in support of such insistence, as well as every point made by him, are predicated on the absence from the complaint of a specific allegation that the real estate involved is situated in Marion county, Indiana.

Only a justice of the peace of the county in which the lands involved are situated has jurisdiction in such an action as this. §8071 Burns 1914,

2. §5225 R. S. 1881. If a court of a justice of the peace does not have jurisdiction over the subject-matter of a cause commenced therein, a circuit court does not acquire jurisdiction on appeal. *Goodwine v. Barnett* (1891), 2 Ind. App. 16, 28 N. E. 115.

It appears from the caption of the complaint here that this cause was commenced before a justice of the peace of Marion county, Indiana. The real

1. estate description as contained in the complaint is as follows: "House No. 1810 Park Ave. Street, in Indianapolis, Indiana." Appellant filed an answer in which he alleged, among other things, that he leased from appellee "the residence property at No. 1744 Park avenue in the city of Indianapolis, Marion county, Indiana," and that subsequently "the street numbering of said property was changed from 1744 Park avenue to number 1810 Park avenue, in said city, county and state."

It thus appears that appellant was not deceived or

- misled by the absence from the complaint of
3 an allegation specifically locating the property
in Marion county.

The judgment describes the real estate as being in Marion county, Indiana. The further specific description as therein contained is as follows:

- “Number 1810 Park avenue, otherwise known
• and described as the south half of lot No. 22 in Caven’s sub-division of lots numbered 6 and 7 of Johnson’s Heirs’ addition to the city of Indianapolis.”

The evidence is not in the record. It should therefore be assumed that certain informalities and uncertainties as contained in the land description in

4. the complaint were removed by the evidence.
Respecting the absence from the complaint of the averment that the real estate involved is
5. situated in Marion county, it may be said that matters of which courts take judicial notice need not be averred in any pleading. §383 Burns 1914, §374 R. S. 1881; *State v. Downs* (1897), 148 Ind. 324, 47 N. E. 670. It is alleged in the complaint that the real estate involved is in the city of Indianapolis. The courts will take judicial notice that the city of Indianapolis is in Marion county, Indiana. *Cluck v. State* (1872), 40 Ind. 263; *Miller v. Miller* (1913), 55 Ind. App. 644, 104 N. E. 588; *Carr v. McCampbell* (1878), 61 Ind. 97; *Turbeville v. State* (1873), 42 Ind. 490; Jones, Evidence (2d ed.) §§108, 127.

- It therefore follows that it sufficiently ap-
1. pears that the real estate involved is in Marion county.

Judgment affirmed.

NOTE.—Reported in 119 N. E. 218. See under (1) 24 Cyc 1439; (3) 4 C. J. 927; (5) 31 Cyc 47.

Diedrich v. Way, Admr.—67 Ind. App. 375.

DIEDRICH ET AL. v. WAY, ADMINISTRATOR.

[No. 9,535. Filed April 10, 1918.]

1. TRIAL.—*Special Findings.—Scope.—Evidentiary Facts.*—Only ultimate issuable facts should be stated in a special finding, and mere evidentiary facts have no bearing on the conclusions of law stated upon a finding of facts. p. 378.
2. EXECUTORS AND ADMINISTRATORS.—*Removal of Administrator.—Discretion of Trial Court.*—A trial court's refusal to remove a duly appointed and qualified administrator, in the exercise of its discretion, will not be reversed on a mere showing that the court in its discretion might have removed him. p. 379.
3. EXECUTORS AND ADMINISTRATORS.—*Failure of Executors to Qualify.—Residuary Legatees.—Right to Petition for Administration.*—Residuary legatees under a will have a legal right to petition for the appointment of an administrator with the will annexed, after the executors named in the will have failed to qualify as required by law. p. 379.

From Laporte Circuit Court; *James F. Gallaher*, Judge.

Proceedings by Johanna Diedrich and another to revoke letters of administration issued to Othie Way, administrator with will annexed of Henry Diedrich, deceased. From a judgment for the administrator, the petitioners appeal. *Affirmed.*

Sutherland & Smith, for appellants.

Frank E. Osborn, Lee L. Osborn and Kenneth D. Osborn, for appellee.

FELT, J.—Appellants, Johanna Diedrich and Henry Diedrich, Jr., instituted proceedings in the Laporte Circuit Court to revoke the letters of administration issued to appellee, Othie Way, administrator with the will annexed of the estate of Henry Diedrich deceased. Issues were formed by an amended petition in two paragraphs, which were answered by general

denial. The gist of the petition was that there was no necessity for administration. The case was tried by the court, a special finding of facts was duly made, and the conclusions of law stated thereon in favor of appellee, to which appellants duly excepted. Judgment was rendered upon the conclusions of law from which appellants have appealed. The only error assigned is that the court erred in each of its conclusions of law.

The substance of the finding of the facts is as follows: On April 1, 1913, Henry Diedrich died testate in Laporte county, Indiana. By his last will and testament he provided for the payment of his just debts, the expenses of his last sickness and funeral, and disposed of the residue of his estate, in substance, as follows: He devised to his wife, Johanna Diedrich, all of his personal property and real estate during life, with power to sell the live stock at her discretion at any time, without any order of court. In item No. 3 he bequeathed \$50 to each of three children in addition to the property given them by item No. 4 of the will. By item No. 4 he devised and bequeathed the residue of his estate to his children, fourteen in number, in equal parts. By the seventh item he named appellants as executors of his last will and testament. The other provisions of the will are unimportant for the purposes of this appeal. The court also found that Johanna Diedrich was the widow of decedent, and that Henry Diedrich, Jr., was his son; that the will was duly probated in the Laporte Circuit Court on April 4, 1913; that immediately after the funeral, appellants and a part of the children of decedent, including Anna Hollandsworth, Edward Bevrige, husband of Minnie Bev-

ridge, and Mary Linard went to the office of W. H. Becher, where the latter read the will of decedent in their presence and hearing; that after the will was so read Anna Hollandsworth and Mary Linard left the office, and thereafter said Becher stated to the appellants that as there were no debts to be paid they need not qualify as executors, and they did not do so at any time; that the aforesaid widow paid the expenses of the sickness and funeral of decedent; that she collected debts due the estate aggregating \$125, but used all of such money in paying the debts and expenses of the estate as aforesaid; that she also bought, and paid for, with her own money, a monument for decedent, costing \$550; that on March 27, 1914, Anna Hollandsworth, Minnie Bevrige and Mary Linard, children of the deceased, and beneficiaries under the aforesaid will, filed their petition in the Laporte Circuit Court asking for the appointment of Othie Way, as administrator, with the will annexed of the estate of Henry Diedrich, deceased, in which petition they alleged that the executors named in the will had failed to qualify as such, and that the widow of decedent was handling and disposing of the personal property left by decedent; that their interests in the estate were such that an administrator with the will annexed should be appointed; that no notice was given to appellants of the filing of said petition, and the court on the day said petition was filed acted thereon and appointed Othie Way administrator as aforesaid; that he duly qualified on said day, and thereafter on April 10, 1914, appellants filed their petition to revoke the letter and remove said administrator from his trust; that on March 27, 1914, there were no assets of said estate to be col-

lected, no debts due the estate, and no debts of the estate unpaid; that Othie Way is acting as such administrator of the aforesaid estate by appointment of the Laporte Circuit Court, and has not resigned therefrom.

The court stated as its conclusions of law: (1) That the petitioners for the removal of said administrator take nothing by their petition; that the law is with the administrator so appointed, and his letters should not be revoked, and he should not be discharged, as prayed in said petition; (2) that petitioners should pay the costs occasioned by their petition aforesaid.

Appellants state that the trial court erred in its conclusions of law because there was no necessity for the issuance of letters of administration on said estate; that at the time of appellee's appointment there were no assets of said estate to be collected, no debts to be paid, and the widow was only doing with the personal property of decedent that which she was authorized to do by the will; that there was an understanding or agreement between the interested parties that there was no need of administration on said estate, and that the executors named in the will need not qualify as such.

There is no finding that supports the contention as to the alleged agreement, and therefore we need not and do not consider the legal effect, if any, of

1. such an agreement. Only ultimate issuable facts should be stated in a special finding, and mere evidentiary facts have no bearing on the conclusions of law stated upon a finding of facts.

The finding of facts shows no legal reason for appellants' neglect or failure to qualify as executors

under the will. It shows that appellee was
2. duly appointed by the court having probate jurisdiction of the estate; that he duly qualified and was acting in pursuance of his appointment so made when the petition for his removal was filed. Appellants have not shown any statutory ground for his removal as provided in §2762 Burns 1914, Acts 1883 p. 151; *Vail v. Givan* (1876), 55 Ind. 59, 64.

But appellant, in effect, contends that the court had the discretionary power to remove appellee. In *Vail v. Givan, supra*, it is stated that all grounds for removal of executors are statutory. In *McFadden v. Ross* (1884), 93 Ind. 134, 138, it is said: "In the appointment as well as the removal of executors and administrators, a large discretion is, from the very nature of those duties, devolved upon the circuit courts." Whether there is any necessary conflict in the above decisions we need not determine in this case, for if it be conceded that the court in its discretion might have removed appellee, such showing alone would not justify a reversal of the judgment in this case. It may be conceded that the facts found indicate that there was no great necessity for appellee's appointment. But the petitioners were

3. residuary legatees under the will, and had a legal right to petition for the appointment of an administrator with the will annexed, after the executors named in the will had failed and neglected to qualify as required by law. Considered from the standpoint of the discretionary power of the court, the finding of facts shows no such abuse of that power as would warrant this court in reversing the judgment. §2741 Burns 1914, §2226 R. S. 1881; §2742 Burns 1914, Acts 1901 p. 281; *Holtz v. Mercantile*,

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etc., *Sav. Co.* (1912), 53 Ind. App. 194, 199, 100 N. E. 398; *Bowen v. Stewart, Admr.* (1891), 128 Ind. 507, 26 N. E. 168, 28 N. E. 73; *Vail v. Givan, supra*; *Croxton v. Renner* (1885), 103 Ind. 223, 226, 2 N. E. 601; *Wallis v. Cooper* (1890), 123 Ind. 40, 23 N. E. 977; *Shrum v. Naugle* (1898), 22 Ind. App. 98, 53 N. E. 243; 18 Cyc 169; 1 Henry, Probate Law §§24, 26, 31, 32, 45, 49, 121, 122, 132, 134.

Judgment affirmed.

NOTE.—Reported in 119 N. E. 223. See under (2) 18 Cyc 170; (3) 18 Cyc 119.

LEPPERT ET AL. v. VANDALIA RAILROAD COMPANY ET AL.

[No. 10,000. Filed November 20, 1917. Rehearing denied February 1, 1918. Transfer denied April 10, 1918.]

APPEAL.—*Time for Taking Appeal.*—*Dismissal.*—Where a judgment was rendered on December 9, 1916, and no motion for a new trial was filed until June 8, 1917, the appeal was not taken within the time fixed by statute and it must be dismissed.

From Marion Superior Court (100,147); *Vincent G. Clifford*, Judge.

Action by Lorenz Leppert and others against the Vandalia Railroad Company and others. From the judgment rendered, the plaintiff appeals. *Appeal dismissed.*

George W. Galvin, for appellants.

Pickens, Moores, Davidson & Pickens, for appellees.

DAUSMAN, J.—The judgment in this cause was rendered on December 9, 1916. No motion for a new

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trial was filed. The transcript was filed in this court on June 8, 1917, and therefore the appeal was not taken within the time fixed by statute.

Appeal dismissed.

NOTE.—Reported in 117 N. E. 656.

KELLER v. COX ET AL.

[No. 9,455. Filed January 18, 1918. Rehearing denied April 10, 1918.]

1. TRIAL.—*Exceptions to Conclusions of Law.—Effect.*—By excepting to the conclusions of law appellant concedes that the facts within the issues are fully and correctly found. p. 385.
2. TRIAL.—*Special Findings.—Failure to Find Essential Fact.—Effect.*—The failure of the court to find a material issuable fact is a finding against the party having the burden of proving the same. p. 386.
3. TRIAL.—*Conclusions of Law.—Sufficiency of Facts Found to Support.*—In an action to set aside a deed on the ground of fraud and undue influence, where the facts found showed neither fraud nor undue influence in procuring the conveyance, the conclusion of law that the deed should not be set aside was supported by the facts and was not erroneous because plaintiff impoverished herself by the conveyance, there being no finding of fact in reference thereto. p. 386.
4. DEEDS. — *Validity. — Conveyance without Consideration.* — The fact that a conveyance was made without any valuable consideration is not alone sufficient ground to set aside a deed where the question arises between the grantor and grantee. p. 386.
5. TRIAL.—*Finding of Fact.—Evidence.—Sufficiency.*—Where there is evidence tending to prove every material fact found by the trial court, the evidence is sufficient to sustain the findings of fact. p. 387.
6. TRIAL.—*Special Findings.—Fact to Be Stated.—Ultimate Facts.—Inferences from Evidentiary Fact.*—A special finding should contain only the ultimate facts in issue, and not mere evidentiary facts, though the trial court may properly state, in its finding, any ultimate or inferential fact established by the evidence. p. 387.
7. TRIAL.—*Special Findings.—Ultimate Facts.—Inferring from Evi-*

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- dence.—Ultimate facts are inferred from evidentiary facts and circumstances, and are fully warranted where they may be reasonably inferred therefrom. p. 387.
8. CANCELLATION OF INSTRUMENTS.—*Deed.*—*Issues.*—*Proof.*—*Pleading Distinct Grounds of Relief.*—In an action to set aside a deed for fraud and undue influence, allegations in the complaint that the conveyance was without consideration and improvident, whether viewed as related to the charge of fraud or undue influence, or as stating a separate ground of recovery, presented issuable facts which plaintiff had a right to prove by competent evidence, since under the Code a plaintiff may in a single paragraph aver all the facts relating to the transaction in controversy and may recover on proof of such part of the facts averred as constitute a ground of recovery, though the complaint may also charge other facts, not proved, which if proved would likewise authorize a recovery. p. 387.
9. DEEDS.—*Validity.*—*Improvident Conveyance.*—*Equitable Relief.*—Where a weak, aged, or infirm person improvidently conveys her property without receiving any valuable consideration therefor, or for grossly inadequate consideration, thereby depriving herself of means of support, equity will require the reconveyance or restoration of the property, upon demand of the grantor, where the parties may be placed in *statu quo*, and such grantor has done or offers to do that which is necessary to restore the *statu quo ante*. p. 389.
10. DEEDS.—*Validity.*—*Constructive Fraud.*—*Improvident Conveyance.*—*Equitable Relief.*—The improvident conveyance of property by a weak, aged, or infirm person without receiving a valuable consideration therefor, or for a grossly inadequate consideration, amounts to constructive fraud, and where the question arises between the improvident grantor and the grantee equity will intervene to compel the restoration of such property. p. 390.
11. CANCELLATION OF INSTRUMENTS.—*Deed.*—*Improvident Conveyance of Property.*—*Evidence.*—In an action to cancel a deed for fraud and undue influence, where the complaint contains allegations sufficient to present the issue that the conveyance was without consideration and improvident, plaintiff was entitled to prove the cost of the reasonable care, attention and maintenance required by her, and the amount of her annual income. p. 392.
12. APPEAL.—*Review.*—*Exclusion of Evidence.*—*Presumption of Error.*—Error in excluding material evidence is presumed to be harmful. p. 392.

From Fountain Circuit Court; *I. E. Schoonover*, Judge.

Action by Josephine Keller against Melissa Jane Cox and another. From a judgment for defendants, the plaintiff appeals. *Reversed.*

O. B. Ratcliff, for appellant.

V. E. Livengood and *Forest E. Livengood*, for appellees.

FELT, J.—Appellant filed her complaint against appellee in two paragraphs. The first paragraph seeks to quiet title to thirty-three acres of real estate in Fountain county, Indiana. The second seeks to set aside a deed by which appellant conveyed said real estate to appellee Melissa Jane Cox on the ground that the conveyance was procured by fraud and undue influence and without any consideration whatever. Issues were joined by general denial, and upon request the court made a special finding of facts and stated its conclusions of law thereon.

The errors assigned and relied on for reversal of the judgment are that the court erred in the first conclusion of law, and in overruling appellant's motion for a new trial.

The substance of the finding of facts is as follows: Appellant was a widow, and the owner of the real estate in controversy. She had one son and three daughters. Appellee Melissa Jane Cox is her daughter, and appellee Robert L. Cox is the husband of Melissa Jane. Appellant's husband died in 1905, when she was about sixty-five years of age. Thereafter she lived a part of the time with her children and part of the time at her home on the real estate in controversy. In 1908 she suffered a slight stroke of paralysis, while living with her daughter, Sarah E. Allen. In February, 1909, after she had largely

recovered, she went to the home of appellee and remained there for about four weeks, after which she went to her own home. In the spring of 1909 appellant had some difficulty or misunderstanding with her son about some rents and personal property. In June, 1909, she informed her daughters that she intended to deed her real estate to them, and that her son should have no part thereof. Her daughter Sarah E. Allen refused to accept such conveyance. Appellant requested her daughter Sarah E. Allen, to communicate with appellee Melissa Jane Cox and inform her of her intention to convey her real estate to her, and to request her to come to appellant's home; that she complied with such request, and was informed by appellant that she desired to make her a deed for her land, reserving to herself the rents and profits, for life, and at her death the said Melissa Jane should divide the proceeds among appellant's three daughters; that said Melissa Jane orally consented to the proposal; that some time thereafter, at the request of appellant, and without the knowledge of appellee, appellant was taken to Covington, by her daughter Mrs. Allen and her husband, where she executed the deed and caused it to be duly recorded; that appellant received no valuable consideration for the conveyance, which was executed on July 13, 1909, reserving the rents and profits of the land to appellant for life. The deed was thereafter mailed to appellant by the recorder, and a few weeks after receiving the same appellant delivered it to appellee Melissa Jane, with arrangements as aforesaid as to sale of the land and distribution of the proceeds. Appellant rented her land both before and after the deed was executed, and received the rents therefrom, amount-

ing to about \$60 per year, which was the reasonable rental value thereof. At the time the deed was executed appellant drew a widow's pension of \$8 per month, which has since been increased to \$12 per month; that appellant owns personal property of the value of \$100, and a small house located on the land of her son-in-law worth \$75, and has no other property or income except as above shown. For some time prior to July 13, 1909, appellant lived with her daughter Sarah E. Allen, and thereafter for about four years, and in February, 1913, she went to reside at the home of her son, Joseph Keller, where she continued to reside; that each of her daughters expressed a willingness to render their mother any care and attention that she required without charge; that appellant's general health is reasonably good, but she is unable to walk about without assistance; that she is illiterate, cannot read or write, but "is a person of sound mind and understanding and was at the date of the execution by her of said deed and fully understood the business she was directing and transacting and deeded it of her own volition without being influenced by her." The findings also show that before bringing this suit appellant requested a reconveyance to her by appellees of the real estate aforesaid, and caused a deed in due form to be duly presented to them, for that purpose, and that they refused to execute the same.

The court stated its conclusions of law to the effect that appellant was not entitled to recover, and that the deed in controversy should not be set aside.

Appellant excepted to the conclusions of

1. law. By so excepting she concedes that the facts within the issues are fully and correctly

found. The failure of the court to find a material issuable fact, the burden of proving which rests upon one of the parties, is a finding against the party having the burden of proving such fact.

No facts are found which show undue influence or fraud in procuring the conveyance, but on the contrary the ultimate facts found show that appellant was of sound mind and fully understood what she was doing, and executed the deed voluntarily, free from any influence of the grantee.

Appellant contends that the conclusions of law are erroneous, because appellant impoverished herself by the conveyance, and did not have sufficient income or property left for her reasonable support.

If it be true that the conveyance was improvident, and that appellant thereby impoverished herself, and did not have sufficient means left to provide for herself reasonable support, still it does not follow that the court erred in its conclusions of law, for no facts are found which show the conveyance to have been improvident, or that appellant did not have sufficient means left for her reasonable and comfortable support.

The findings do show that the conveyance was made without any valuable consideration, but this alone is not sufficient ground to set aside a deed where

4. the question arises between the grantor and the grantee. *Barnes v. Bartlett* (1874), 47 Ind. 98, 103; *Aldrich v. Amiss* (1912), 178 Ind. 303, 305, 99 N. E. 419.

The court did not err in its conclusions of law on the facts found.

Appellant also contends that the evidence is insufficient to sustain the finding of facts, but such

5. contention cannot be sustained, since there is evidence tending to prove every material fact found by the court. A special finding should
6. contain only the ultimate facts in issue, and may not properly contain mere evidentiary facts. The trial court may properly state in its finding any ultimate or inferential fact established by the facts and circumstances shown by the evidence in the case.

Ultimate facts are inferred from evidentiary facts and circumstances, and are fully warranted where they may reasonably be inferred therefrom.

7. *Bradway v. Groenendyke* (1899), 153 Ind. 508, 512, 55 N. E. 434; *Craig v. Bennett* (1896), 146 Ind. 574, 575, 45 N. E. 792; *Barrett v. Sipp* (1911), 50 Ind. App. 304, 314, 98 N. E. 310.

As grounds for a new trial appellant urges that the court erred in excluding certain evidence.

Appellant offered to prove by competent witnesses that they were acquainted with the cost of the reasonable care, attention and maintenance re-

8. quired by appellant, in her condition, and that the same amounted to \$400 per year; that her total income did not exceed \$204 per year. The testimony was excluded on objections made by appellees, to which rulings appellant duly excepted. Appellant also offered to prove that appellant's enfeebled condition was incurable, and that her condition would not improve, but would grow worse. This evidence was also excluded on objection by appellees, to which ruling appellant excepted.

Some of the evidence suggested may have been

excluded because of the form of the questions, but numerous questions were asked seeking to prove the facts suggested, and there is enough in the record to require this court to consider the alleged error in excluding the offered evidence.

In the second paragraph of her complaint appellant avers that she received no consideration for making the conveyance to her daughter; that to induce her to convey the real estate in controversy appellees promised and agreed that they would reconvey the same to her whenever she requested them so to do, "or in case said lands became necessary to her support"; that the rents and profits of said real estate and her pension are wholly insufficient to supply her needed support and maintenance; that before bringing this suit she caused a demand to be made upon appellees for a reconveyance to her of the real estate, and notified them that she disaffirmed her deed to said Melissa Jane, and caused a deed to be duly prepared and tendered to appellees, by the execution of which they were to reconvey said real estate to her and place her in *statu quo*, but appellees refused and still refuse to execute such deed or to reconvey the land to her.

The trial court seems to have excluded the offered evidence on the ground that it was not germane or material to either the issue of fraud or undue influence presented by the complaint.

The second paragraph of complaint contains averments, in addition to those above set out, which are sufficient to present the issues of fraud and of undue influence.

Appellant, in effect, contends that the averments above set out present another issue, upon which there

may be a recovery independent of the issues of fraud and undue influence, by proving that the conveyance was improvident, but that appellant thereby deprived herself of the necessary means of support.

Under our Code a plaintiff may in a single paragraph aver all the facts relating to the transaction in controversy and may recover on proof of such part of the facts averred as constitute a ground of recovery, though the complaint may also charge other facts, not proved, which if proved would likewise authorize a recovery. *Merica v. Ft. Wayne, etc., Traction Co.* (1911), 49 Ind. App. 288, 294, 97 N. E. 192; *Gould Steel Co. v. Richards* (1902), 30 Ind. App. 348, 352, 66 N. E. 68.

The averments above set out seem to afford a ground of recovery independent of the other averments which show fraud and undue influence. But whether the averments be viewed as related to the charge of fraud or undue influence, or as stating another cause of action or separate ground of recovery, they present issuable facts which the parties were entitled to prove or disprove by any competent evidence.

Where a weak, aged, or infirm person improvidently conveys her property without receiving any valuable consideration therefor, or for a

9. grossly inadequate consideration, and thereby deprives herself of the means necessary for her reasonable support and maintenance, equity will require the reconveyance or restoration of such property, or the annulment of the transfer by which such aged or infirm person improvidently disposed of the same, upon demand of the donor or grantor, where the parties may be placed in *statu quo*, and such

grantor has done or offers to do that which is necessary to restore the *statu quo ante*, and it is shown that the property in question is in fact needed for the reasonable support and maintenance of such donor or grantor.

Under the law such facts amount to constructive fraud, and where the question arises between the improvident grantor or donor and the grantee

10. or donee, equity will intervene to compel the restoration of such property so improvidently disposed of. This may be done though the deed or instrument by which the conveyance or transfer was made does not contain stipulations for the revocation of the gift, or the reconveyance of the property, if the necessary averments are made to bring the case within the rule, and the proof may be made by parol or other competent evidence. *Richards v. Reeves* (1897), 149 Ind. 427, 431, 49 N. E. 348 *et seq.*; *Ewing v. Wilson* (1892), 132 Ind. 223, 226, 31 N. E. 64, 19 L. R. A. 767 *et seq.*; *Culley v. Jones* (1904), 164 Ind. 168, 175, 73 N. E. 94; *Ashmead v. Reynolds* (1893), 134 Ind. 139, 143, 33 N. E. 763, 39 Am. St. 238; *Tee-garden v. Lewis* (1895), 145 Ind. 98, 114, 40 N. E. 1047, 44 N. E. 9 *et seq.*; *Ikerd v. Beavers* (1886), 106 Ind. 483, 489, 7 N. E. 326; 2 Pomeroy, Eq. Jurisp. (2d ed.) §§922, 924, 927, 928, 943, 944, 948, 951, 955, 956, 957; 1 Story, Equity §§258, 259, 307-309; 20 Cyc 1219; *Highberger v. Stiffler* (1863), 21 Md. 338, 83 Am. Dec. 593, 597; *Nichols v. McCarthy* (1885), 53 Conn. 299, 315, 23 Atl. 93, 55 Am. Rep. 105; *Davis v. Dean* (1886), 66 Wis. 100, 26 N. W. 737, 741; *Gibson v. Hammang* (1901), 63 Neb. 349, 88 N. W. 500, 502; *Worrall's Appeal* (1885), 110 Pa. 349, 1 Atl. 380, 765; *Tracey v. Sacket* (1852), 1 Ohio 54, 59 Am. Dec. 610,

614; *Hart v. Hart* (1898), 57 N. J. Eq. 543, 546, 42 Atl. 153.

In *Hart v. Hart*, *supra*, 546, the court of Chancery of New Jersey said: "But I am of the opinion that the deeds and assignments of August 9th should not be permitted to stand. They were clearly improvident acts of an old lady of easily influenced mental disposition, who lived in the family of the grantee. The proof of the fairness of the transaction is thrown upon him. The improvidence of these transfers is obvious." In *Richards v. Reeves*, *supra*, our Supreme Court said: "It is to be remembered that this was not, strictly speaking, a contract between Mrs. Thompson and appellees, but a gift by her to them. They had given nothing for what was promised them in the deed; and while, in general, a gift, under such circumstances, will be upheld in favor of a donee who is unwilling that it should be revoked, and particularly in favor of a minor for whom the law makes an acceptance, and who is himself unable to relinquish such gift, yet the reasons for upholding a contract do not obtain in all their force in favor of sustaining a simple gift, whether *inter vivos* or *causa mortis*. Equity will set aside such a voluntary gift when it is made to appear that the donor did not intend to make it irrevocable, or where the settlement would be unreasonable or improvident for lack of a provision for revocation. Mrs. Thompson had the first right to the use of her property; and if, through kindness to her son and grandchildren, she forgot what might be needed for her own and her husband's feeble old age, and so, improvidently, deeded to them what she herself required to live upon, and which she never intended to give up, so far as might be neces-

sary for her sustenance, then the deed resulting from such a mistake will be set aside, as in other cases of mistake or in case of fraud. Even in case of pure contract, and where there is no question of gift, the law will give relief where proof of mistake or fraud is clear and convincing. Equity will not lend its sanction to what is unconscionable. * * * It is enough, in this case, that the facts admitted to be true by the demurrer to the answer show that Mrs. Thompson's deed was improvident, and that she needed the property for herself and her aged husband, that she intended to retain the right to revoke the gift, and that it was only by her own ignorance and mistake, and that of the scrivener, that a clause to show the retaining of such right of revocation was not inserted in the deed."

In the light of the law as declared in similar cases, it was error to have excluded the evidence offered as above indicated. While the findings are

11. against appellant on the issues of fraud and undue influence, it is apparent that an erroneous view was taken as to the effect of the averments above indicated and the importance of the evidence excluded.

The error in excluding material evidence is presumed to be harmful, and we are unable to say that the view of the law which led to the exclusion

12. of the evidence as aforesaid was not influential in the ultimate decision of the case. For the errors in excluding evidence as above shown, the judgment should be reversed.

Information of the death of the appellant since the date of submission of the cause has been brought to the attention of the court. The judgment is there-

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fore reversed as of the date of submission, with instructions to the lower court to sustain the motion for a new trial, and to permit such amendments as may be necessary in the premises.

Ibach, C. J., Batman, P. J., Dausman, Caldwell, and Hottel, JJ., concur.

NOTE.—Reported in 118 N. E. 543. See under (4) 13 Cyc 534; (5) 38 Cyc 1967; (6) 38 Cyc 1981; (7) 38 Cyc 1981; (8, 9) 9 C. J. 1249; (10) 13 Cyc 574; (11) 13 Cyc 581.

GEARHART, ADMINISTRATRIX, v. GEARHART ET AL.

[No. 9,546. Filed April 11, 1918.]

EXECUTORS AND ADMINISTRATORS.—*Payment of Debts.—Personalty.—Realty.*—The one-fourth interest in a decedent's estate, including the interest in his real estate which the mother inherits under §3027 Burns 1914, §2489 R. S. 1881, is not subject to sale to make assets to pay the debts of the estate before resorting to other personal property sufficient for that purpose, since §2848 Burns 1914, §2332 R. S. 1881, provides that the real estate of deceased shall be sold to pay debts only when the personal estate of decedent is insufficient for that purpose, and §2927 Burns 1914, §2405 R. S. 1881, further provides that the surplus estate, after payment of debts and expenses, shall be distributed to the legal heirs according to the laws in force at the time of decedent's death.

From Allen Circuit Court; *John W. Eggeman*, Judge.

Proceedings on the petition of Bertha Gearhart, administratrix of the estate of Edward L. Gearhart, deceased, for an order to sell real estate. On issues formed on an answer by the Peoples Trust and Savings Company, as guardian of Mary E. Gearhart, there was a judgment against the petitioner and she appeals. *Affirmed.*

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*Leonard, Rose & Zollars and William Fruechte-
nicht*, for appellant.

Breen & Morris, for appellees.

FELT, J.—Edward L. Gearhart died intestate, leaving surviving him as his only heirs at law his widow, Bertha Gearhart, and his mother, Mary A. Gearhart, who is a person of unsound mind and under guardianship. His widow was appointed administratrix of his estate by the Allen Circuit Court, and thereafter filed her petition praying for an order to sell the undivided one-fourth of the real estate of which Edward L. Gearhart died seized.

It is agreed by the parties that at the time of his death decedent owned real estate of the value of \$6,000 and personal property of the value of \$7,784.86; also that the debts of the estate amounted to \$2,800.37, and that the total value of the personal property left by decedent exceeds the amount of the indebtedness of the estate by \$4,984.49.

To the petition of appellant the Peoples Trust and Savings Company, as guardian of Mary E. Gearhart, filed an answer in which it set up in substance the facts as to the heirs and property of decedent as above indicated, and other facts to show that the real estate was not liable to make assets to pay debts of the estate, and that the personal property was more than sufficient for that purpose. The issues so formed were tried by the court, and a finding made that the personal property was sufficient to pay all the debts and expenses for which the estate was liable, that the debts should be paid from the personal estate, and that the real estate was not liable to sale for that purpose. The judgment follows the finding, and is

against appellant on her petition. Appellant filed a motion for a new trial, which was overruled, and an exception reserved.

The only error assigned is the overruling of the motion for a new trial, which was asked on the ground that the decision of the court is not sustained by sufficient evidence, and is contrary to law.

Appellant does not deny that under §3027 Burns 1914, §2489 R. S. 1881, the mother of decedent would inherit one-fourth of his estate, but contends that her one-fourth, including her interest in the real estate of decedent, must first be exhausted to pay debts of the estate before resort can be had to the other personal property of the estate.

The law has long been established in this state that the personal property of a decedent is the primary source of funds for the payment of the debts of the estate, and that the real estate of such decedent is only liable for the payment of such debts when the personal property is insufficient to pay the same. §2848 Burns 1914, §2332 R. S. 1881; *Ditton v. Hart* (1911), 175 Ind. 585, 594, 95 N. E. 119; *LaPlante v. Convery* (1884), 98 Ind. 499, 500; *Edwards v. Haverstick* (1874), 47 Ind. 138, 140.

Section 2927 Burns 1914, §2405 R. S. 1881, enacted in 1881, provides that: "When the deceased shall have died intestate, the surplus of his estate remaining in the hands of the executor or administrator, after the payment of debts and expenses of administration * * * shall be distributed to the legal heirs of the deceased according to the laws of this state in force at the time of his death."

The statute is plain and unambiguous. Furthermore, the identical question presented by this appeal

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has been decided adversely to appellant's contention. On the admitted facts of this case there was no legal justification for instituting this proceeding, since the personal estate was more than sufficient to pay the debts of the estate and costs of administration. *Quirk v. Kirk, Admx.* (1916), 64 Ind. App. 496, 114 N. E. 109; *Roberts, Admx., v. Dimmett* (1909), 45 Ind. App. 566, 570, 89 N. E. 496; *Ruch, Admr., v. Biery* (1887), 110 Ind. 444, 450, 11 N. E. 312.

This appeal is plainly without merit. There is no reasonable ground for a difference of opinion on the question presented. Appellant seems to be using the estate to try out a visionary proposition whose only basis seems to rest in her own desire to absorb the estate to the exclusion of the mother of decedent.

For this reason the judgment is affirmed, with instructions to tax the costs of the appeal to appellee Bertha Gearhart personally.

NOTE.—Reported in 119 N. E. 217. See under (1) 18 Cyc 591.

A. E. GARLAND AND COMPANY ET AL. v. ALLEN.

[No. 9,533. Filed May 11, 1917. Rehearing denied January 27, 1917.

Transfer denied April 11, 1918.]

APPEAL.—*Dismissal on Settlement.*—On appellee's verified motion to dismiss on the ground that the parties have amicably adjusted all matters involved, the appeal will be dismissed, where appellants, with due notice of the filing of the motion, fail to make a counter showing.

From Marion Circuit Court (24,859); *Louis B. Eubank*, Judge.

Action by Oliver M. Allen against A. E. Garland

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and Company and others. From the judgment rendered, the defendants appeal. *Appeal dismissed.*

Bachelder & Bachelder and *Richard Coleman*, for appellants.

Holtzman & Coleman, for appellee.

DAUSMAN, J.—Appellee instituted this action against appellants to replevin an automobile, and to recover damages for the unlawful detention thereof. Trial by the court resulted in judgment for the delivery of the automobile to appellee, and for \$100 damages; also judgment for appellant for \$92.52 against appellee on appellants' claim for storage charges.

Appellee has filed a verified motion to dismiss the appeal on the ground that appellants, in obedience to the order of the court, have delivered the automobile to appellee, and that the parties have amicably adjusted all matters involved herein. Appellants have had due notice of the filing of said motion, but have made no counter showing. Their silence, therefore, must be taken as an admission of the correctness of the statements embodied in the motion.

Appeal dismissed.

NOTE.—Reported in 116 N. E. 8.

SMITH, ADMINISTRATRIX, v. CLEVELAND, CINCINNATI,
CHICAGO AND ST. LOUIS RAILWAY COMPANY.

[No. 9,160. Filed November 1, 1917. Rehearing denied December 20, 1917. Transfer denied April 11, 1918.]

1. *APPEAL—Term-Time Appeal.*—Where plaintiff prayed an appeal, but the amount of bond was not fixed, no sureties named, and no time given in which to file an appeal bond, it cannot be

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- said that plaintiff attempted to take a term-time appeal, as such steps were necessary preliminaries to perfecting such an appeal. p. 405.
2. **APPEAL.—Vacation.—Term-Time.—Failure to Perfect.—Effect.**—An appeal prayed and granted in term, if not perfected as such, will be treated and sustained as a vacation appeal, where the statutory requirements for such an appeal have been followed. p. 405.
3. **APPEAL.—Perfecting.—Certification of Record.**—Where, subsequently to the filing of appellee's motion to dismiss the appeal for improper certification of the record, appellant was granted permission to have the clerk amend the original certificate to the transcript, and a new certificate of the clerk of the trial court in due form was appended thereto bearing a date two days later than the granting of the permission, the new certificate substantially complied with the permission, and cured any defects in the original certification. p. 406.
4. **APPEAL.—Bill of Exceptions.—Incorporation in Record.—Judge's Signature.—Filing.**—To incorporate a bill of exceptions in the record, it must be filed in the clerk's office after it has been signed by the trial judge. p. 406.
5. **APPEAL.—Record.—Bill of Exceptions Containing the Evidence.—Recital as to Evidence.**—Where the judge's certificate to a bill of exceptions containing the evidence recited that the transcript of the evidence embodied in the bill was certified to be a full, true and complete report of the evidence given on the trial, the bill sufficiently showed that it contained all the evidence given at the trial, since such fact may be shown either by a statement in the bill itself, or in the judge's certificate thereto. p. 407.
6. **APPEAL.—Record.—Assignment of Errors.—Separate Assignments.**—Where the assignment of errors, after giving the court and title of the cause, recited that "the appellant says there is manifest error prejudicial to appellant in the judgment and proceedings in this cause in this," following which were five separate and distinct assignments of error, separately stated and numbered, no one of which called in question more than one ruling of the trial court, the assignments were several and not joint. p. 407.
7. **APPEAL.—Waiver of Error.—Failure to Reserve Exception.**—Error, if any, in the action of the trial court striking out certain interrogatories to the jury is waived, where appellant fails to show that she reserved any exception to the court's ruling and the question is not otherwise presented in her brief. p. 408.
8. **APPEAL.—Review.—Harmless Error.—Sustaining Motion for Peremptory Instruction.**—The action of the trial court in sustaining defendant's motion for a peremptory instruction does not

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constitute reversible error, since the mere sustaining of the motion was not harmful to plaintiff, but the substantial and available error, if any, being in instructing the jury to find for defendant. p. 408.

9. **TRIAL.—Peremptory Instruction.—Consideration of Evidence.**—A trial court is authorized to direct a verdict in favor of a defendant only where there is an entire lack of evidence on some essential phase of the case necessary to a recovery, and, when a motion is made for such a verdict, it is for the court to say whether there is any evidence to support each material issue or fact, and if there is such evidence, its weight or probative value is for the jury, and, in event the evidence is conflicting, so much thereof as is favorable to the party making the motion is deemed withdrawn, for the purpose of deciding the question presented by the motion, and the court will consider only the evidence, if any, favorable to the opposite party. p. 409.
10. **DEATH.—Wrongful Death.—Actions.—Existence of Beneficiary.—Allegation and Proof.—Statute.**—Damages recovered under §285 Burns 1914, Acts 1899 p. 405, giving a right of action for wrongful death, inures to the exclusive benefit of the widow or widower, and children, if any, or next of kin, and if no such persons exist, the action cannot be maintained, so that the existence of some such beneficiary must be alleged and proved. p. 410.
11. **DEATH.—Wrongful Death.—Actions.—Existence of Beneficiary.—Allegation and Proof.—Statute.**—In an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, it is unnecessary to name in the complaint the persons entitled to the damages, it being sufficient to allege and prove the existence of such persons. p. 411.
12. **DEATH.—Wrongful Death.—Actions.—Failure to Name Beneficiaries in the Complaint.—Distribution of Damages.**—In an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, the failure to name in the complaint certain persons who are entitled to share in the damages does not prevent them from participating in the distribution. p. 411.
13. **DEATH.—Wrongful Death.—Actions.—Complaint.—Naming Improper Beneficiaries.—Statute.**—In an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, the fact that certain persons are named in the complaint as next of kin who are not such within the meaning of the statute does not deprive an administrator of his right to maintain the action for the benefit of those who are proper beneficiaries. p. 411.
14. **DEATH.—Wrongful Death.—Actions.—Parties.—Statute.**—In an action for wrongful death under §285 Burns 1914, Acts 1899

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p. 405, though the damages inure to the exclusive benefit of the widow, children and next of kin, they have no right to be parties, and cannot compromise or control the action. p. 411.

15. *DEATH.—Wrongful Death.—Actions.—Complaint.—Allegations as to Beneficiaries.—Statute.*—In an action under §285 Burns 1914, Acts 1899 p. 405, brought for the benefit of dependent next of kin, it is only necessary to allege such facts on that subject as will show that some one or more of such beneficiaries exist. p. 411.
16. *DEATH.—Wrongful Death.—Actions.—Identity of Beneficiaries.—Pleading.*—In an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, the identity of the beneficiaries only becomes important in determining the amount of damages, but such proof can be made under allegations of their existence made in general terms. p. 412.
17. *DEATH.—Wrongful Death.—Actions.—Defenses.—Statute.*—In an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, if next of kin are named or proved who are not beneficiaries within the meaning of the statute, and the damages of such alleged beneficiaries are greater than the damages of the real beneficiaries, the existence of the latter and the amount of damages sustained by them is a proper matter of defense. p. 412.
18. *DEATH.—Wrongful Death.—Actions.—Damages.—Distribution.—Statute.*—In an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, if beneficiaries are named in the complaint, or proof thereof is made under a complaint in general terms, distribution of the recovery is not limited to the persons actually entitled to receive the same under the statute, even to the exclusion of the persons so named or proved; such questions being for the determination of the court having probate jurisdiction. p. 412.
19. *DEATH.—Wrongful Death.—Actions.—Beneficiaries.—Proof.*—Where, in an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, the complaint named three aunts of decedent as the nearest of kin who were dependent upon him for support, proof of the nonexistence of grandchildren or other next of kin was not necessary to a recovery. p. 413.
20. *RAILROADS.—Injuries on Tracks.—Trains Passing at Station.*—A railroad company is under a common-law duty to use caution in passing with one train another train receiving and discharging passengers at a station. p. 415.
21. *RAILROADS.—Injuries on Tracks.—Trains Passing Station.—Negligence.—Violation of Rule.*—The violation by a railroad of its rule to the effect that "trains must use caution in passing a train receiving and discharging passengers at a station, and must not pass between it and the platform at which the passengers are being received or discharged," was not negligence *per se*, but was proper, in an action for wrongful death, as an item of

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evidence tending to show the degree of care recognized by the road as ordinary care under the conditions specified in the rule. p. 415.

22. **RAILROADS.—Injuries on Tracks.—Care Required.**—Where the tracks of a railroad curved sharply to the east and west of a station, and passed through deep cuts and between high hills, so as to obstruct the view of approaching trains, it was the duty of the road's servants operating a train to use reasonable care to ascertain if a train was at the station discharging passengers and, if so, to stop, as required by a rule of the railroad and not attempt to pass between the standing train and the station platform, and to have used such reasonable care as might be necessary for the protection of any person lawfully using the tracks at that point. p. 416.

23. **RAILROADS.—Injuries on Tracks.—Reasonable Care.—What Constitutes.**—What constitutes reasonable care on the part of railroad employes operating a train for the protection of persons lawfully using the tracks at a station depends upon circumstances, and may require constant outlook after the place of possible danger is visible, the giving of warning signals, reduction of speed, or even stopping the train. p. 416.

24. **TRIAL.—Directing Verdict.—Power of Trial Court.—Weighing Evidence.**—The trial court cannot weigh the evidence to determine the facts involved in order to direct a verdict. p. 416.

25. **RAILROADS.—Injuries on Tracks.—Negligence.—Jury Question.**—In an action against a railroad for the death of one using its tracks at a station, the complaint being grounded on defendant's alleged negligence in running its train past another train discharging passengers at a station in violation of its rules and without using due care, where the evidence was conflicting as to the speed of the train, when the steam was shut off and whether warning signals were given, the question of defendant's negligence under the circumstances was for the jury, so that the court was not warranted in directing a verdict for defendant. p. 416.

26. **DEATH.—Wrongful Death.—Contributory Negligence.—Statutes.**—In an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, it is not necessary for plaintiff to allege or prove want of contributory negligence on the part of decedent, since contributory negligence in such an action is made a matter of defense by the provisions of §362 Burns 1914, Acts 1899 p. 58. p. 417.

27. **DEATH.—Wrongful Death.—Contributory Negligence.—Jury Question.—Directing Verdict.**—As a rule, in actions for wrongful death, decedent's contributory negligence is a question for the jury, and only becomes a question of law for the court when the

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circumstances are such that but one inference can be drawn by reasonable minds with reference to decedent's conduct upon the particular occasion, and if there is evidence indicating contributory negligence, regardless of its weight and character, the court is not justified in directing a verdict against plaintiff if there is evidence to the contrary, though such evidence is apparently overborne by other evidence more convincing. p. 417.

28. RAILROADS.—*Injuries on Tracks.—Trespasser.*—Where one went to a railroad station to ship a case of eggs, and after doing so, decided to wait for a milk can he was expecting on another train, he was not a trespasser, but was rightfully on the railroad's premises, bound to exercise reasonable care for his own safety commensurate with the dangers of which he had either actual or constructive knowledge. p. 418.

29. DEATH.—*Wrongful Death.—Actions.—Directed Verdict.—Evidence.—Contributory Negligence.*—Where one rightfully on the premises of a railroad was killed at its station, mere absence of evidence of the exercise of reasonable care by decedent would not authorize a directed verdict for the railroad in an action for the death, but only such affirmative evidence as would impel but one inference—that of contributory negligence when considered by reasonable minds. p. 418.

30. RAILROADS.—*Injuries on Tracks.—Contributory Negligence.—Care Required.*—Due care for his own safety required a person on the station premises of a railroad to use reasonable diligence and caution to protect himself from all dangers arising from the operation of passing trains in a prudent and proper manner, and in such other manner as may have been, or could have been, known to him by the exercise of ordinary care under the circumstances, but he was not required to use such unusual and extraordinary care as would be necessary for his protection from dangers arising from the reckless or negligent operation of passing trains of which he had no knowledge, either actual or constructive, in time to escape. p. 418.

31. RAILROADS.—*Injuries on Tracks.—Anticipating Negligence.—Presumption as to Speed.*—One rightfully on the station premises of a railroad has a right to assume, in the absence of knowledge or warning to the contrary, that trains will not be operated at an excessive speed, and without due signals, or in any other negligent manner. p. 419.

32. RAILROADS.—*Injuries on Tracks.—Contributory Negligence.—Conflicting Evidence.—Jury Question.*—Where one was killed on a railroad's station premises by one train passing another train which was receiving and discharging passengers, and the evidence, in an action for the death, was conflicting as to the care used in operating the train striking decedent, both as to its speed

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and where and when warning signals, if any, were given, and the jury might have found, on weighing the evidence, that decedent was rightfully on the track, and used reasonable care for his own safety as against all known danger, or danger which he might reasonably have anticipated or known by the exercise of due care, but notwithstanding such care he was killed because of the negligent manner in which the train was operated under the existing circumstances, the question of decedent's contributory negligence was for the jury. p. 419.

33. *DEATH.—Wrongful Death.—Actions.—Damages.—Evidence.—*

In an action for wrongful death, evidence that decedent was an industrious, successful and experienced farmer was admissible as bearing on the damages to decedent's next of kin, part of whom lived with him on a farm owned jointly by them. p. 420.

34. *APPEAL.—Presenting Questions for Review.—Judgment.—Cor-*

rection.—Motion to Modify.—A motion to modify is the proper procedure to correct an erroneous judgment, and such motion must be made to present any question on appeal as to the correctness of the judgment. p. 421.

35. *EXECUTORS AND ADMINISTRATORS.—Administrator's Action for*

Wrongful Death.—Tazing Costs of Decedent's Estate.—Statute.—In an administrator's action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, the trial court had no authority to adjudge, on the administrator being defeated in the action, that the costs be paid from decedent's estate. p. 421.

36. *EXECUTORS AND ADMINISTRATORS.—Actions by.—Costs.—*

When an administrator sues in his trust capacity, judgment should be rendered against him in such capacity for costs where he fails in an action, and the costs should be paid from the funds in his hands belonging to the branch of his trust to which such suit pertained, and, if there be no funds in that branch of his trust, the costs must remain unpaid, since they cannot be charged against the administrator personally. (*Brunning v. Golden* [1902], 159 Ind. 199, distinguished.) p. 423.

From Dearborn Circuit Court; *Warren N. Hauck*, Judge.

Action by Susie Smith, administratrix of the estate of Frank Hiatt, deceased, against the Cleveland, Cincinnati, Chicago and St. Louis Railway Company. From a judgment for defendant, the plaintiff appeals. *Reversed.*

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Estel G. Bielby and Richard L. Ewbank, for appellant.

Thomas S. Cravens, L. J. Hackney and F. L. Littleton, for appellee.

BATMAN, J.—This is an action by appellant against appellee to recover damages on account of the death of appellant's decedent, alleged to have been caused by appellee's wrongful acts. The complaint is in three paragraphs; the first being grounded on the alleged negligence of the appellee in failing to establish and enforce proper and safe rules for the management of its trains, and the negligent operation of its trains without such rules; the second, on alleged negligence in operating its trains under the circumstances and conditions described therein; and the third, upon the theory of the last clear chance. The issues were closed by a general denial, and were submitted to a jury for trial. After appellant had closed her evidence, appellee moved the court to instruct the jury to return a verdict in favor of appellee, which motion was sustained, and an exception to such ruling was reserved. The court thereupon directed the jury to return a verdict for appellee, which was accordingly done. Appellant filed her motion for a new trial, which was overruled, and an exception reserved. The court thereupon rendered the following judgment, to which appellant objected and excepted, to wit: "It is therefor considered and adjudged by the court that the plaintiff take nothing by reason of her cause of action herein, and that the defendant do have and recover of and from the plaintiff, payable out of the assets of the estate of the decedent, Frank Hiett, its costs herein laid out and expended taxed at \$——." Appellant thereupon filed her

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motion to modify said judgment in so far as it gave judgment against the estate of said decedent for costs, by striking therefrom that portion thereof, directing such costs to be paid out of the assets of the estate of said decedent. The court overruled this motion, and the appellant reserved an exception to such ruling. Appellant appealed, and has called in question by an assignment of errors the action of the court in sustaining appellee's motion to strike out certain interrogatories, in overruling her motion for a new trial, and in overruling her motion to modify the judgment as to costs.

Appellee has filed its motion to dismiss the appeal herein, for the reason that appellant attempted to take a term-time appeal, but failed to perfect it by not filing the record in this court within the time allowed by law for a term-time appeal, and for the further reason that the record is not properly certified.

The record shows that at the time the court overruled appellant's motion to modify the judgment, she prayed an appeal which was granted. No

1. amount of bond was fixed, no sureties were named, nor time given in which to file an appeal bond. These were necessary preliminary steps for perfecting a term-time appeal, and since they were not taken, we do not believe it can be said that appellant attempted to take a term-time appeal by the mere praying of an appeal and having the same granted. The fact that appellant omitted such essential steps may well lead to the conclusion that a vacation appeal was contemplated at the time. But be that as it may, we deem it well settled that an
2. appeal prayed and granted in term, if not perfected as such, will be treated and sustained

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as a vacation appeal, where the statutory requirements for such an appeal have been followed. *Burns v. Trustees, etc.* (1903), 31 Ind. App. 640, 68 N. E. 915; *Kellogg v. Ridgely* (1907), 40 Ind. App. 423, 81 N. E. 1158. In regard to the certification of the record it may be noted that subsequently to the filing of

appellee's motion to dismiss, appellant was

3. granted permission to have the clerk amend the original certificate to the transcript. Such permission was granted on June 23, 1915, and there is now appended to the transcript a new certificate of the clerk of the trial court in due form, bearing the date of June 25, 1915. This is a substantial compliance with the permission granted, and cures any defects in the original certification. Appellee's motion to dismiss must therefore be overruled.

Appellee, in its brief on the merits, points out several objections to the record, which it claims is fatal to the appeal. We will now consider these ob-

4. jections. It is claimed that appellant's bill of exceptions No. 2, on the action of the court in giving the peremptory instruction to the jury, cannot be considered a part of the record, as it appears from the bill itself that it was not signed until the day following the date on which it was filed by the judge with the clerk. This objection has been cured subsequently to the filing of appellee's brief by the return to a writ of *certiorari*, issued from this court on June 20, 1917, which shows that such bill of exceptions was in fact filed in the office of the clerk of the Dearborn Circuit Court on November 12, 1914, after it had been signed by the judge trying said cause. Such objection therefore requires no further consideration. Appellee also claims that there is no

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recital in the transcript that appellant's bill of exceptions were made a part of the record in the cause, but in making this claim it is evidently mistaken, as appears from the record showing the filing of the same.

Appellee further claims that appellant's bill of exceptions No. 1, containing the evidence, does not recite that it contains all the evidence given

5. in the cause, and that therefore such evidence cannot be considered. It has been repeatedly held that this fact may be shown either by a statement in the bill itself, or in the judge's certificate thereto. *Ehrisman v. Scott* (1892), 5 Ind. App. 596, 32 N. E. 867; *Jordan v. Muth* (1892), 6 Ind. App. 655, 34 N. E. 29; *Petree v. Fielder* (1891), 3 Ind. App. 127, 29 N. E. 271; *Great Council, etc. v. Green* (1912), 52 Ind. App. 198, 100 N. E. 472. We have examined the bill of exceptions and find that the judge's certificate thereto recites the following: "The foregoing long-hand copy and transcript of the evidence, now embodied in the foregoing bill of exceptions, is hereby made a bill of exceptions for the plaintiff in the above entitled cause, and is hereby certified to be a full, true, and complete report of the evidence presented on said trial and contains all of the evidence given in the trial of said cause." We consider this a substantial compliance with the requirement in this regard.

Appellee also claims that the assignment of errors is joint and not several as to the errors alleged, and

that the court must sustain each assignment

6. in order that appellant may prevail on appeal.

An examination of the assignment of errors does not disclose that they are joint as claimed by appellee. Such assignment after giving the court,

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and title of the cause states as follows: "The appellant says there is manifest error prejudicial to appellant in the judgment and proceedings in this cause in this:" Here follow five separate and distinct assignments of error, separately stated and numbered, no one of which calls in question more than one ruling of the court. We hold that the assignments are several and not joint as contended by appellee.

When we come to consider the record on the merits of the questions raised by appellant, we find that she has waived her first and second assignments

7. of error, relating to the action of the court in striking out certain interrogatories, by not showing that she reserved any exception to the court's ruling thereon, and in not otherwise presenting the same in her brief. The third assignment of error is based on the action of the court in overruling appellant's motion for a new trial. Several reasons are assigned therein, which we shall consider in their order as stated.

The first of such reasons relate to the action of the court in sustaining appellee's motion for a peremptory instruction. This action of the court does

8. not constitute reversible error, since the mere sustaining of such motion worked no injury to appellant, but the substantial and available error, if any, was in instructing the jury to find in favor of appellee. *Getchel v. Chicago Junction R. Co.* (1902), 29 Ind. App. 410, 64 N. E. 618.

The second, third, fourth, and fifth reasons relate to the action of the court in giving the jury a peremptory instruction to return a verdict for appellee. The sixth alleges that the verdict of the jury is not

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sustained by sufficient evidence, and the seventh alleges that the verdict is contrary to law. These several reasons for a new trial, in so far as they are properly assigned and presented, in their final analysis present the same question, viz.: Did the trial court err in peremptorily instructing the jury to return a verdict for appellee?

It is well settled that a trial court is only authorized to direct a verdict in favor of a defendant in an action where there is an entire lack of evidence

9. on some essential phase of the case necessary to a recovery. Where a motion is made for such a verdict, it is for the court to say whether there is any evidence to support each material issue or fact, and if there is such evidence, its weight or probative value is for the jury, and not for the court. If there is conflict in the evidence, so much thereof as is favorable to the party making such motion is deemed withdrawn, for the purpose of deciding the question presented by the motion, and the court will consider only the evidence, if any, favorable to the opposite party. *Jackson Hill Coal, etc., Co. v. Bales* (1915), 183 Ind. 276, 108 N. E. 962; *Sullivan v. Indianapolis, etc., Traction Co.* (1913), 55 Ind. App. 407, 103 N. E. 860; *Bennett v. Chicago, etc., R. Co.* (1911), 50 Ind. App. 264, 98 N. E. 192.

Appellant claims that there was evidence which at least tended to support every material fact alleged in her complaint, and that the directed verdict, therefore, was unauthorized, while appellee contends that there was no evidence to establish certain material facts necessary for a recovery, and the verdict, therefore, was properly directed.

We shall first consider the evidence on the allega-

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tions of the complaint, as to the existence of next of kin on which appellee raises a question. Each paragraph of the complaint contains the following averments: "That said decedent left surviving him three aunts, sisters of his deceased mother, who were dependent upon him for support. That said surviving dependent aunts of said decedent were and are named as follows, Melissa Smith, Sophia Smith, Susie E. Smith, the last named being the plaintiff in this action, and said surviving aunts of said decedent are the nearest of kin of said decedent who were dependent upon him for support." Appellee contends that under such allegations it was necessary for appellant to prove on the trial not only that such persons were decedent's aunts and dependent on him for support but also that they were his nearest of kin thus dependent. On this point appellee insists that there was no evidence that decedent did not leave dependent grandchildren surviving him, and that therefore there was a total want of evidence to establish the material fact that such aunts were the nearest of kin dependent on him for support. We do not find that this identical question has been expressly decided in this state. Appellee does not cite any such authority, and our investigation discloses none. However, there are some decisions which throw light on the question under consideration, among which we cite the following: Damages recovered under §285

Burns 1914, Acts 1899 p. 405, inures to the

10. exclusive benefit of the widow or widower, and children, if any, or next of kin. If no such persons exist, the action cannot be maintained, and hence the existence of some such beneficiary must be alleged and proved. *Stewart, Admr., v. Terre Haute, etc.,*

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R. Co. (1885), 103 Ind. 44, 2 N. E. 208; *Chicago, etc., R. Co. v. LaPorte* (1904), 33 Ind. App. 691, 71 N. E. 166; *Wabash R. Co. v. Cregan, Admr.* (1899), 23 Ind. App. 1, 54 N. E. 767. It is unnecessary to name the

persons entitled to such damages, but it will be

11. sufficient to allege and prove the existence of such persons. *Indianapolis, etc., R. Co. v. Keeley's Admr.* (1864), 23 Ind. 133; *Jeffersonville, etc., R. Co. v. Hendricks, Admr.* (1872), 41 Ind. 48; *Commercial Club, etc. v. Hilliker* (1898), 20 Ind. App. 239, 50 N. E. 578. The failure to name in the

complaint certain persons who are entitled to

12. share in such damages does not prevent them from participating in the distribution of the same. *Duzan v. Myers* (1902), 30 Ind. App. 227, 65 N. E. 1046, 96 Am. St. 341. The fact that certain persons are named in the complaint as next of

13. kin who are not such within the meaning of the statute, does not deprive an administrator of his right to maintain the action for the benefit of those who are proper beneficiaries. *Clore v. McIntire, Admr.* (1889), 120 Ind. 262, 22 N. E. 128. The widow, children, and next of kin are not par-

14. ties. They have no right to be parties, and cannot compromise or control the action. *Cleveland, etc., R. Co. v. Osgood* (1905), 36 Ind. App. 34, 73 N. E. 285; *Yelton, Admr., v. Evansville, etc., R. Co.* (1893), 134 Ind. 414, 33 N. E. 629, 21 L. R. A. 158.

It therefore appears that in an action under

15. §285, *supra*, brought for the benefit of dependent next of kin, it is only necessary to allege such facts on that subject as will show that some one or more of such beneficiaries exist.

The identity of such beneficiaries only becomes

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important in determining the amount of damages, but such proof can be made under allegations

16. of their existence made in general terms. If next of kin are named or proved who are not beneficiaries within the meaning of the statute,
17. no harm results to the defendant charged, unless the damages of such alleged beneficiaries are greater than the damages of the real bene-
18. ficiaries. In that event their existence and amount of damages sustained is a proper matter of defense. If beneficiaries are named in the complaint, or proof is made thereof under a complaint in general terms, the distribution is not limited to the persons so named or proved, but will be distributed to the persons actually entitled to receive the same under the statute, even to the exclusion of the persons so named or proved. Such questions are for the subsequent determination of the court having probate jurisdiction. *Duzan v. Myers, supra; Missouri, etc., R. Co. v. Barber* (1890), 44 Kan. 612, 24 Pac. 969, cited with approval in the case of *Chicago, etc., R. Co. v. LaPorte, supra*.

Appellee also contends that the evidence shows that the three beneficiaries named in the complaint and the decedent were conducting a business together in pursuance of a contract, under such circumstances as to preclude a recovery by reason of a failure to show that such maiden aunts were dependent on decedent, within the meaning of the statute. We do not consider the evidence on this point of such a character as to require the court to say, as a matter of law, that their relations were purely contractual. It was of such a character that the jury, after weighing the evidence, might have concluded that such

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aunts suffered a pecuniary loss in being deprived of decedent's services. *Smith v. Michigan Cent. R. Co.* (1904), 35 Ind. App. 188, 73 N. E. 928; *Henry v. Pendergast* (1912), 51 Ind. App. 43, 94 N. E. 1015.

19. We therefore conclude that proof of the non-existence of grandchildren or other next of kin was not necessary to a recovery, and that the evidence given with reference to the relationship and dependency of the aunts named required the issue thereon to be submitted to the jury, if there was evidence on all other material allegations. It will be noted that in this case there was no evidence of any dependent next of kin, other than those named in the complaint. If appellant has sought to recover on proof of other dependent next of kin in addition to, or to the exclusion of those named, a different question might have arisen which we need not consider here. *Quincy Coal Co. v. Hood, Admr.* (1875), 77 Ill. 68; *Chicago, etc., R. Co. v. LaPorte, supra.*

We shall now consider whether there was such evidence on the allegations of negligence, on the part of appellee, as authorized the giving of such peremptory instruction. The evidence introduced on the trial tended to establish the following facts: That at the time of the acts mentioned in the complaint, and for a long time prior thereto, appellee had maintained a double track through the station of Guilford, Indiana, extending in an easterly and westerly direction; that the east-bound trains were operated on the south track, and the west-bound trains were operated on the north track; that the depot at said station was located on the north side of said double track, and a cinder platform was maintained on the south side thereof, which was used in receiving and discharging freight

and passengers on trains coming from the west and going toward the east; that said railroad tracks are much curved both to the east and west of said station, and pass through deep cuts and between high hills, so as to obstruct the view of approaching trains; that when an east-bound train was standing on said south track, it cut off the view of a west-bound train on the north track, so that it could not be seen by a person standing on such track at the station until it was within 450 or 500 feet; that it was the custom at such time, and had been for many years prior thereto, for passengers and shippers, who used the east-bound trains of appellee for transportation, to cross said double track at such station to enter said trains and to deliver and receive their shipments; that at times such patrons of appellee would pass around the ends of such trains for such purpose; that appellee had knowledge of such custom, and had constructed a walkway across said tracks at said station to facilitate its patrons therein; that said west-bound train usually passed said east-bound train west of the station of Guilford, but that it was behind time on this occasion, and that its operators should have anticipated that said east-bound train might be at such station discharging passengers when it passed the same. It was also in evidence that appellee had theretofore established the following rule for the operation of its trains, which was in force at the time of the injury to appellant's decedent:

“Trains must use caution in passing a train receiving and discharging passengers at a station, and must not pass between it and the platform at which the passengers are being received or discharged,”—

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but that appellee had construed such rule as not applying at the station of Guilford, Indiana, for the reason that passengers were received and discharged from the east-bound trains on the south side of the east-bound track, and not between the east-bound track and the west-bound track.

There was evidence from which the jury might have concluded that the passengers from the east-bound train on the occasion decedent was killed were in fact being discharged on the platform on the north side of the double track, adjacent to the depot, by being first required to alight on the cinder platform on the south side, and from thence to cross over such double track to the platform on the north side, in order to reach the depot; that such platform on the north side, therefore, was the actual place of discharge, notwithstanding such indirect or circuitous route.

It is apparent that the first part of said rule added nothing to the duty of appellee, not already imposed by the common law, but the latter part thereof

20. enjoined a specific act of caution, under the conditions named, which might or might not be the same degree of care required by the common law, depending on whether or not the conditions and circumstances existing at said time and place were such that the ordinary care required by the common law would require such train to stop. Such rule, therefore, was applicable at said station of

21. Guilford. However, the violation of such rule would be, in no event, negligence *per se*, but was proper as an item of evidence tending to show the degree of care recognized by appellant as ordinary care, under the conditions specified in such rule.

Under the undisputed evidence it was clearly the duty of appellee's servants operating said west-bound train, under the common law as well as such

22. rule, to have used reasonable care to ascertain if such train was at such station discharging passengers at such time and, if so, to have observed such rule and used such reasonable care as might be necessary for the protection of any person lawfully using such track at the station at such time. *Manion v. Lake Erie, etc., R. Co.* (1907), 40 Ind. App. 569, 80 N. E. 166; *Virgin v. Lake Erie, etc., R. Co.* (1913), 55 Ind. App. 216, 101 N. E. 500; *Pittsburgh, etc., R. Co. v. Lynch* (1908), 43 Ind. App. 177, 87 N. E. 40; *Cleveland, etc., R. Co. v. Miles* (1903), 162 Ind. 646, 70 N. E. 985. What constitutes reasonable

23. care depends upon the circumstances, and may require constant outlook, after the place of possible danger is visible, the giving of warning signals, and reduction in speed, or even stopping the trains, in order to discharge the duty imposed.

The evidence is conflicting as to the rate of speed at which such west-bound train was going when it reached Guilford station. Some witnesses placed it as fast as sixty miles per hour. The evidence is also conflicting as to when the steam was shut off and the brakes applied, if at all; what warning signals were given and where given, if any. In order for the trial court to determine the facts involved, it

24. would have been necessary to weigh the evidence, which it cannot do in order to direct a verdict. We therefore conclude that there was

25. not such a want of evidence as to the acts of negligence charged as to warrant the court in directing a verdict in favor of appellee. Appellee

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further contends that the court below was required to direct a verdict in its favor because the evidence showed that appellant's decedent was guilty of negligence contributing to his own injury. In this contention we do not concur. It should be remembered

that in actions of this kind it is not necessary

26. for the plaintiff to allege or prove the want of contributory negligence on the part of the plaintiff or on the part of the person for whose injury or death the action is brought, but contributory negligence on the part of the plaintiff or such other person is a matter of defense. §362 Burns 1914, Acts 1899 p. 58. As a rule, it is a question for the jury, and only becomes a question of law for the court when the circumstances are such that but one

27. inference can be drawn by reasonable minds with reference to the plaintiff's conduct upon the particular occasion. If there be evidence indicating contributory negligence, no matter what its weight or character, still a court would not be justified in directing a verdict against a plaintiff on that account, if, in fact, there is evidence to the contrary, although it may apparently be overborne by other evidence more convincing. *Beaning v. South Bend Electric Co.* (1909), 45 Ind. App. 261, 90 N. E. 786. In this case there was some evidence to indicate that appellant's decedent had been a shipper on appellee's road from the station in question for many years; that on the day he met his death he had gone to such station to ship a case of eggs on appellee's road; that he crossed from the depot over the double track to the cinder platform, and deposited his case of eggs, and then recrossed the double track to the depot; that he was preparing to return home when

he learned the east-bound train was coming, and decided to wait for a milk can he was expecting on such train; that as such train approached he stepped out on the north track where he stood talking to one Buchanan; that just as said train was coming in Buchanan passed on over to the cinder platform and decedent went back to the platform at the depot; that he stood on such platform until the east-bound train was about to depart and then started to cross over said double track to the cinder platform for his milk can; that when he reached the north track he stopped for such train to pull by and while so doing he called to an acquaintance on the moving train, waved to him, and was struck and killed in an effort to leave said north track.

Under such circumstances said decedent would not have been a trespasser, merely loitering, as suggested by appellee, but would rightfully be on such

28. premises, bound, however, to exercise reasonable care for his own safety commensurate with the dangers of which he had either actual

29. or constructive knowledge. Mere absence of evidence of the exercise of such care would not authorize a directed verdict for appellee, but only such affirmative evidence as would impel but one inference—that of contributory negligence when considered by reasonable minds. Such care required the decedent to use reasonable diligence and caution to protect himself from all dangers arising from the operation of passing trains on said north track

30. in a prudent and proper manner, and in such other manner as may have been, or could have been, known to him by the exercise of ordinary care under the circumstances; but he was not required to

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use such unusual and extraordinary care as would be necessary for his protection from dangers arising from the operation of passing trains in a reckless or otherwise negligent manner of which he had no knowledge, either actual or constructive, in time to escape. The evidence is such that the jury might have found, if it had been permitted to weigh the evidence, that the train which killed decedent was being negligently operated by reason of excessive speed and want of proper signals, under the existing circumstances, but there is no evidence that the decedent knew that such train was being so operated, and no evidence from which such an inference could be properly drawn. He cannot be held to be at fault for failing to anticipate negligence on the part of appellee. In

31. fact he had a right to assume, in the absence of knowledge or warning to the contrary, that appellee's trains would not be operated at excessive speed, and without due signals, or in any other negligent manner. *Indianapolis Street R. Co. v. Hoffman* (1907), 40 Ind. App. 508, 82 N. E. 543; *Louisville, etc., Traction Co. v. Lottich* (1915), 59 Ind. App. 426, 106 N. E. 903; *Indiana Union Traction Co. v. Cauldwell* (1915), 59 Ind. App. 513, 107 N. E. 705.

The evidence in this case was conflicting as to the care used in operating the train in question, both as to speed and signals, and the jury might have

32. found, on weighing the evidence, that the decedent was rightfully on the track and used reasonable care for his own safety as against all known danger, or danger which he might reasonably have anticipated or known by the exercise of due care, but notwithstanding such care he was killed because of the reckless and consequently negligent man-

ner in which appellee operated its train under the existing circumstances. The question, therefore, was one of fact for the jury, and not one of law for the court.

The eighth and ninth reasons assigned for a new trial need not be considered, since they are fully covered by our conclusion with reference to other reasons already determined.

The tenth and eleventh reasons assigned for a new trial call in question the action of the court in excluding certain oral evidence offered by the wit-

33. ness Harry Huddleston. The particular question asked was as follows: "I wish you would state to the jury if you know, what kind of a farmer Mr. Hiatt was prior to his death?" The offer to prove was as follows: "The plaintiff expects to prove in answer to the question that Frank Hiatt, deceased, was an industrious farmer, a good producer from the farm, and an experienced scientific farmer." The court sustained an objection to the question, and in so doing committed error. One of the questions at issue was the amount of damages sustained by the alleged next of kin on account of decedent's death. There was evidence tending to show that he lived with certain next of kin in a common family on a farm they owned jointly, and from which a fund was produced from which all lived as such family; that in this way he rendered valuable services to such next of kin, of which they were deprived by his death to their damage. Under such circumstances the offered evidence was clearly competent, and it was error to exclude it, since the loss would be greater if he was an industrious and experienced farmer, than it would be if he was indolent and a mere novice. *Pittsburgh,*

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etc., R.-Co. v. Parish (1901), 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. 120. We therefore conclude that the court erred in overruling appellant's motion for a new trial.

The fourth and fifth assignments of error relate to the action of the court in rendering judgment against the estate of appellant's decedent for costs,

34. and in overruling her motion to modify such judgment with reference thereto. The courts have held that a motion to modify is the proper procedure to correct an erroneous judgment, and that such motion must be made to present any such question on appeal. *Migatz v. Stieglitz* (1905), 166 Ind. 361, 77 N. E. 400; *Home Brewing Co. v. Johnson* (1907), 41 Ind. App. 44, 83 N. E. 358.

The question presented by the motion of appellant to modify the judgment as to costs is as to the right of a court to adjudge that the costs in a suit

35. brought by an administrator for the death of his decedent caused by the wrongful acts or omissions of another under §285 Burns 1914, *supra*, be paid from the estate of such decedent, where such administrator is defeated in such action. Our conclusion is that the court has no such authority, and that error was committed in overruling appellant's motion to modify the judgment in this case in that regard.

This exact question does not seem to have been presented to this or the Supreme Court in many cases, but we find that it has been decided against appellee's contention in the case of *Brooks v. Muncie, etc., Trac-tion Co.* (1911), 176 Ind. 298, 95 N. E. 1006. That was a case of the same nature as the one at bar, where an administrator brought suit for the alleged neg-

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ligent killing of his decedent. The jury returned a verdict for the defendant and judgment was rendered thereon in the following form: "It is therefore considered by the court that plaintiff take nothing by his action herein, and that defendant have and recover of and from the plaintiff its costs in this behalf laid out and expended, taxed at \$——." The plaintiff appealed, and asserted that the assets of decedent's estate are not liable for costs, as such estate has no interest whatever in the result of such suit, and that judgment cannot be properly rendered against the estate for such costs. The court in passing upon this question said on page 307: "This action was brought under §285 Burns 1908, Acts 1899 p. 405, by the administrator, for the exclusive benefit of decedent's widow. The judgment is not a lien on the assets of decedent's estate, but is against the plaintiff suing in the capacity provided for in §285, *supra*." Here the Supreme Court, in effect, holds that the judgment was in proper form in being rendered against the plaintiff in his trust capacity, being the capacity in which he sued, but that it did not follow, by the form of such judgment, that the assets of such estate were liable for the payment of such costs, by expressly holding that the judgment is not a lien on the assets of decedent's estate. There is nothing unreasonable or inconsistent in such a holding. The administrator of the estate of a decedent who has met his death through the negligence of another, while serving in the single capacity of administrator, has duties to perform in two separate and distinct capacities, one being to administer the personal estate possessed by decedent at the time of his death, and the other being to prosecute an action for damages on account of such

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negligent killing under §285 Burns 1914, *supra*, and distribute the proceeds derived therefrom in accordance therewith. Such proceeds cannot be used to pay the debts of decedent or the liabilities of his estate; neither can the assets of the estate be used to pay the costs made in the prosecuting of such statutory proceedings. In any case, when an administrator sues in his trust capacity, judgment should be ren-

36. dered against him in such capacity for costs where he fails in such action. Such costs, however, should be paid from the funds in his hands belonging to that branch of his trust to which such suit pertained, and if there be no funds in that branch of his trust, such costs must remain unpaid, as in case of any insolvent litigant, since they cannot be charged to the administrator personally. *Evans, Admx., v. Newland* (1870), 34 Ind. 112; *Cavanaugh, Admr., v. Toledo, etc., R. Co.* (1874), 49 Ind. 149. Any other construction would work manifest injustice in many instances against creditors, and against heirs and legatees, who were not entitled to recover under §285, *supra*. Illustrations of this will readily occur on reflection. The case of *Lake Erie, etc., R. Co. v. Charman* (1903), 161 Ind. 95, 67 N. E. 923, supports the conclusion we have reached. The question under consideration by the court in that case was as to the competency of a party to testify as a witness, rather than the determination of a question of costs, but the reasoning is pertinent, as the court gives as a reason for the competency of the witness in question the fact that in actions brought under §285, *supra*, the assets of an estate are not liable for costs or other charges accruing therein, and under no circumstances can judgment be rendered against an estate therefor. Ap-

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pellee cites the case of *Bruning v. Golden* (1902), 159 Ind. 199, 64 N. E. 657, in support of his contention, but that case differs in an essential point from the one at bar, in this, that the costs in that case did not grow out of an action prosecuted under §285, *supra*, but out of an action involving assets alleged to have been left by decedent at the time of his death. In view of what we have already said the difference is obvious, and the case cited does not support appellee's contention. Appellee also cites the case of *Chicago, etc., R. Co. v. Harshman, Admr.* (1898), 21 Ind. App. 23, 51 N. E. 343, in support of his contention. That case was decided in 1898, while the case of *Brooks v. Muncie, etc., Traction Co., supra*, was decided by the Supreme Court in 1911, and impliedly overrules the same, in so far as there is conflict between the two decisions on the question of costs.

Judgment reversed, and cause remanded, with instructions to sustain appellant's motion for a new trial.

NOTE.—Reported in 117 N. E. 354. Master and servant: violation by servant of rule adopted by railroad company for protection of the public, as evidence of negligence toward a member of the public, 8 L. R. A. (N. S.) 1063. See under (9) 38 Cyc 1586, 1577; (10) 17 C. J. 1215, 1285, 1286; (11) 17 C. J. 1285, 1286, 1301; (12) 17 C. J. 1287; (13) 17 C. J. 1286; (14) 17 C. J. 1269, 1271; (15) 17 C. J. 1285; (16) 17 C. J. 1285, 1301; (17) 17 C. J. 1240; (18) 17 C. J. 1226, 1287; (19) 17 C. J. 1301; (20) 33 Cyc 808; (21) 33 Cyc 808, 881; (22) 33 Cyc 808; (23) 33 Cyc 808; (24) 38 Cyc 1587; (25) 33 Cyc 896; (26) 17 C. J. 1289; (27) 17 C. J. 1311; (28) 33 Cyc 844; (30) 33 Cyc 844; (31) 33 Cyc 836, 837; (32) 33 Cyc 904; (33) 17 C. J. 1328; (34) 3 C. J. 874; (35) 18 Cyc 1095; (36) 18 Cyc 1095.

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REED, EXECUTRIX, v. FARMERS BANK OF FRANKFORT.

[No. 9,503. Filed April 12, 1918.]

1. **APPEAL.—Presenting Questions for Review.—Assignment of Error.—Ruling on Motion to Dismiss.**—No question is presented for review as to the trial court's overruling defendant's motion to dismiss the complaint as to her where such ruling is not challenged by any assignment of error. p. 428.
2. **ABATEMENT AND REVIVAL.—Executors.—Substitution in Suit.—Voluntary Appearance.—Statutes.**—Section 2829 Burns 1914, §2311 R. S. 1881, providing that no action shall be brought by complaint and summons against any executor on contract, etc., has no application to a case where suit was not brought against an executrix, but against her deceased husband prior to his death, and upon her substitution as the representative of his estate, she appeared to the action, so that, under the provisions of §318 Burns 1914, §315 R. S. 1881, relating to service of summons, there was no need for summons. p. 428.
3. **PARTNERSHIP.—Action on Partnership Note.—Complaint.—Sufficiency.**—In an action on a partnership note, an amended paragraph of complaint averring that the named defendants doing a partnership business under a certain firm name executed the note, that the defendant who signed the firm name to the note by himself as manager was a member of the firm and its manager with authority to execute the note, and that he had a right to deliver the instrument to the payee, was sufficient as against a demurrer on the ground that the complaint did not allege facts to show the authority of such manager to sign the firm name for the members thereof. p. 429.
4. **PARTNERSHIP.—Action on Partnership Note.—Complaint.—Sufficiency.—Averment as to Partnership Assets.**—In an action against a partnership on a firm note, where the complaint stated a common cause of action against all the members of the firm, the fact that one of them died and that the executrix of his will was substituted as his defendant, since it did not affect plaintiff's cause of action, or make it a claim against the estate of the deceased member of the partnership, did not make essential to the sufficiency of the complaint averments showing that there were no partnership assets out of which plaintiff could make its claim and that there was no solvent partner living. p. 430.
5. **APPEAL.—Briefs.—Sufficiency.—Abstract Propositions of Law.**—Where appellant's motion for a new trial contained a number of

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separate grounds, and in her points and authorities under the heading, "On the Admission of Evidence," were stated numerous general propositions without applying them to any particular ground of the motion, the briefs did not comply with the rules of court. p. 430.

6. WITNESSES.—*Competency.—Transaction with Deceased.—Statute.*—In an action against a partnership on a firm note where the executrix of a deceased partner was substituted for him as a defendant, where, after one of the partners had identified an exhibit tending to prove the partnership and testified without objection that he and the deceased partner had signed it, the executrix objected on the ground that it was "an effort to prove a partnership existing between this defendant and another defendant which will affect the rights of the defendant administratrix, and for the reason that the evidence is incompetent" under §521 Burns 1914, §498 R. S. 1881, relating to competency of witnesses in suits in which an executor or administrator is a party, such objection was too late if directed to the identification of the instrument and untenable to the admission of the exhibit. p. 431.

7. WITNESSES.—*Competency.—Transaction with Deceased.—Statutes.*—In an action on a partnership note where the executrix of a deceased partner was substituted for him as a defendant, testimony of a surviving partner that he signed the firm name to the note by himself as manager, being directly antagonistic to his interest, was admissible under §526 Burns 1914, Acts 1883 p. 102, excepting from the provisions of §521 *et seq.* Burns 1914, §498 R. S. 1881, relating to the competency of witnesses to testify as to matters occurring during decedent's lifetime, a party adverse to the party calling him. p. 432.

From Monroe Circuit Court; *Robert W. Miers*, Judge.

Action by the Farmers State Bank of Frankfort against Harriett Reed, executrix of the last will and testament of Samuel P. Reed, deceased, and others. From a judgment for plaintiff, the named defendant appeals. *Affirmed.*

Jesse B. Fields, for appellant.

Joseph E. Henley and *George W. Henley*, for appellee.

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HOTTEL, J.—This is an appeal by appellant from a judgment for \$889 in appellee's favor in an action brought by it in July, 1911, in the Monroe Circuit Court, on a note for \$580.50 payable to the order of the "Wallace Manufacturing Company * * * at the Bloomington National Bank, Bloomington, Indiana," and signed by "Garrison Brick Company, C. P. Garrison, Manager."

The suit was against Samuel P. Reed, Charlie P. Garrison and John H. Huntington. The complaint alleges that said defendants were partners doing business under the firm name of the "Garrison Brick Company," and that under such firm name they executed the note in suit, a copy of which is made part of the complaint by way of exhibit; that after the execution of the note, and before the same became due, the Wallace Manufacturing Company indorsed it to appellee. A copy of said indorsement is also made part of the complaint by way of exhibit. At the October term, 1912, of said court, the death of the defendant Samuel P. Reed was suggested by the plaintiff (appellee), whereupon the court ordered that Harriett Reed, executrix of the last will and testament of said Samuel P. Reed, deceased, be, and she was, made a defendant. Other proceedings were had in said cause which we deem it unnecessary to set out, and the same was continued from time to time until October 5, 1915, when the cause was dismissed as to John H. Huntington, and the case put at issue. A trial by the court resulted in a general finding in favor of appellee against the defendants Garrison and Reed, executrix, as principals on said note, and that the Wallace Manufacturing Company

is secondarily liable as the indorser. Judgment was rendered accordingly.

Reed alone appeals, and assigns as errors the following rulings of the trial court: (1) The complaint of the appellee does not state facts sufficient to constitute a cause of action against appellant. (2) The court erred in overruling the demurrer of appellant to the amended complaint of appellee. (3) The court erred in overruling appellant's motion for a new trial.

Under points and authorities in her brief, appellant challenges the action of the court in overruling her motion to dismiss the complaint as to her. It

1. will be observed that such ruling is not challenged by any assignment of error, and hence is not presented for our determination. We
2. might add in this connection that the only reason suggested by appellant in her points and authorities in support of her contention that the cause should have been dismissed as to her is that furnished by §2829 Burns 1914, §2311 R. S. 1881, which provides that no action shall be brought by complaint and summons against any executor, administrator, and any other person or persons or his or their legal representatives on contract, etc.

The answer to this contention is that this action was not brought against the executrix, but against her deceased husband before his death. Upon her substitution as the representative of the estate of the deceased husband, she appeared to the action, and there was no need for a summons. §318 Burns 1914, §315 R. S. 1881.

Appellant has not set out in her brief the complaint, the note sued on, or the demurrer to the complaint, or the memorandum filed therewith. This is not a com-

pliance with the rules of the court, but under her points and authorities and under the heading "On Overruling Appellant's Demurrer to * * * Complaint," appellant states two general propositions which appellee has in effect treated as being a sufficient challenge of the complaint, and we will likewise so treat said propositions. They are in substance as follows: (1) That such complaint does not allege facts showing the authority of C. P. Garrison to sign said note as and for the members of the firm constituting the "Garrison Brick Company"; and (2) that such complaint does not contain averments showing that there are no partnership assets out of which appellee could make its claim and no solvent partner living.

As affecting said first ground of objection, the amended complaint contains said general averment, indicated *supra*, that the defendants, Samuel

3. P. Reed, Charlie P. Garrison and John H. Huntington, by the firm name and style of the Garrison Brick Company executed said note, and also the specific averments as follows: That C. P. Garrison, the person who signed the firm name and style of "Garrison Brick Company" to said note by himself as manager, is the same person as Charlie P. Garrison, one of the defendants herein; that at the time said defendant C. P. Garrison signed the firm's name to said note he was a member of said firm of Garrison Brick Company, and was the manager thereof, and as such member and manager was authorized by said firm to sign and execute said note, and that he was acting within the scope of his authority and within the scope of the firm's business, and had a right to execute and deliver said note to

the payee thereof. These averments, we think, are a complete answer to appellant's first objection.

In support of its second objection, appellant cites the case of *Weyer v. Thornburgh, Admr.* (1860), 15 Ind. 124. This case simply holds that inasmuch as partnership creditors have a priority in the distribution of partnership assets, and individual creditors can only take the excess, so individual creditors have a priority in the individual assets, and partnership creditors can only have distribution of the surplus. There is nothing in the case tending to support appellant's said second proposition, *supra*.

As before indicated, this action was the ordinary suit on a note executed by the partnership. It was not a claim against the estate of a deceased .

4. member of such partnership, but a complaint against all the members of such firm. The complaint stated a common cause of action against all of such members, and the fact that one of them died and that the executrix of his will was substituted as his defendant did not affect appellee's cause of action on said note, or make the averments insisted on by appellant essential or necessary thereto. Appellant's right to have partnership property, if there is any, exhausted before the property of the estate of her decedent could have been reached in another way.

Appellant's motion for a new trial contains sixteen separate grounds. In her points and authorities under the heading "On the Admission of Evi-

5. dence," she states numerous general propositions without applying them to any particular ground of said motion. This was not a compliance with the rules. *German Fire Ins. Co. v. Zonker* (1914), 57 Ind. App. 696, 108 N. E. 160; *Chicago, etc.*,

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R. Co. v. Dinius (1913), 180 Ind. 596, 103 N. E. 652. However, the particular ground of the motion for a new trial to which some of said propositions were intended to be directed is fairly inferable from their wording, and appellee so interprets such propositions and discusses them. These will be considered and determined.

The first of said propositions is as follows: In suits in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate. §521 Burns 1914, §498 R. S. 1881.

Appellee has assumed, and doubtless properly so, that this proposition is directed to the admission of the evidence of the defendant Garrison in rela-

6. tion to the identification of exhibit A. The record, however, shows that Garrison identified said instrument and testified without objection that he and Reed had signed it. This evidence authorized the admission of such exhibit as evidence, provided, of course, that it was material. The exhibit, in fact, proved or tended to prove the partnership. The appellant at this point objected on the ground that it was "an effort to prove a partnership existing between this defendant and another defendant which will affect the rights of the defendant administratrix, and for the reason that the evidence is incompetent under the statute." This objection was wholly untenable, if directed to the admission of the exhibit,

and if directed to the identification of the instrument it came too late. We might add that the signature to said instrument was identified by other disinterested witnesses whose testimony was uncontradicted. This entitled the instrument to go in as evidence in any event.

Garrison also testified that he signed the name "Garrison Brick Company, C. P. Garrison, Manager," to the note in suit, and it is conceded by

7. appellee that this action of the court is challenged by appellant. This ruling is justified by appellee, and correctly so we think, on the ground that the evidence elicited from the witness was directly antagonistic to his interest. Section 526 Burns 1914, Acts 1883 p. 102, excepts from the provisions of said §521 *et seq.*, a party to a suit who is adverse to the party calling him. As affecting this question, see *Leach v. Dickerson* (1895), 14 Ind. App. 375, 42 N. E. 1031. Here again another witness testified to seeing Garrison sign the note in suit.

Other rulings relating to the admission of evidence are discussed by the parties, but, so far as presented by the record, they are in effect disposed of by what we have already said.

No reversible error being shown, the judgment of the trial court is affirmed.

Batman, P. J., not participating.

NOTE.—Reported in 119 N. E. 261. Substitution of executor or administrator, 50 Am. St. 741. See under (2) 1 C. J. 239; (6) 40 Cyc 2310.

WRIGHT v. GREEN ET AL.

[No. 10,019. Filed April 23, 1918.]

1. FRAUDS, STATUTE OF.—*Sale of Land.—Parol Contract.—Force.*—A parol agreement that in consideration of the surrender by the natural parent of a child to be adopted by another, such adopted child shall inherit land is a contract for the sale of land and falls within the prohibition of the statute of frauds, §7462 Burns 1914, §4904 R. S. 1881. p. 437.
2. FRAUDS, STATUTE OF.—*Sale of Land.—Parol Contract.—Statute.*—An agreement in parol that an adopted child shall inherit land is not taken out of the control of the statute of frauds, §7462 Burns 1914, §4904 R. S. 1881, by performance on the part of the child by living with the adopted parents in conformity with the agreement. p. 437.
3. ADOPTION.—*Agreement for Inheritance by Adopted Child.—Control of Property.*—An agreement that an adopted child shall inherit land, in consideration of its surrender by its natural parent, and its adoption under such circumstances, does not deprive the parents by adoption of the right of absolute control and enjoyment of property owned or acquired by them, nor does it take away or limit their right to dispose of their property during life in such manner as they may choose. p. 438.
4. FRAUD.—*Fraud as to Child.—Agreement for Inheritance.—Pleading.—General Averment.*—In an action to set aside deeds, a complaint alleging that a child was surrendered by its natural parent to be adopted by another in consideration of an agreement to make such child an heir and that the parent by adoption disposed of her lands to prevent such child from obtaining the same in accordance with the agreement, is insufficient to show fraud; nor is the complaint aided by a general averment of fraud. p. 438.

From Howard Circuit Court; *Charles A. Cole*, Special Judge.

Action by Wilma N. Wright, by Joseph W. Lindley, her next friend, against William Benton Green and others. From a judgment for defendants, the plaintiff appeals. *Affirmed.*

Charlton Bull and Bell, Kirkpatrick & Voorhis, for appellant.

Blacklidge, Wolfe & Barnes, for appellees.

FELT, J.—This suit was brought by appellant against appellees to declare void and annul certain deeds, and also to set aside the will of Lucinda E. Foreman, deceased, in so far as the same affects the 100 acres of real estate conveyed by decedent to Wilma N. Wright, by the deed as hereinafter mentioned. The complaint is in one paragraph.

Appellees' separate demurrers for insufficiency of the facts alleged to state a cause of action were each sustained. Other grounds of the demurrers are not considered in the briefs. To each of such rulings appellant excepted, refused to plead over, and elected to stand upon the rulings so made. Thereupon the court rendered judgment that appellant take nothing by her complaint and pay the costs of the suit. From this judgment appellant prayed and was granted an appeal.

The errors assigned challenge the correctness of each of the rulings on the demurrers to the complaint.

The substance of the complaint, as far as material here, is as follows: Appellant, Wilma N. Wright, was born on April 8, 1909. She was the natural child of Eva Slack, and her father died prior to December 15, 1909. The mother was in indigent circumstances, and Lucinda E. and William E. Wright, then husband and wife, desired to adopt the child. Lucinda E. Wright was at that time the owner of 226 acres of real estate in Howard county, Indiana, and offered to adopt appellant, and promised her mother "that the child should inherit from her the 226 acres of land which she owned" if the said Eva Slack would

surrender her right to the child and consent to her adoption as aforesaid. William E. Wright also promised to make the child heir to his property. Thereupon Eva Slack, the mother, accepted the promise so made, and on the date aforesaid consented to the adoption, which was duly made by order of the Howard Circuit Court. The child was accordingly taken into the home of its adopted parents, where it remained until the death of its adopted mother on April 19, 1914. Eva Slack made the aforesaid agreement for and on behalf of her child, the plaintiff, and for her use and benefit. Subsequently to the adoption of the child, said Wright and Wright were divorced, and Lucinda E. Wright's name was restored or changed to Lucinda E. Foreman. Plaintiff and her mother, Eva Slack, in all things faithfully complied with all the terms and conditions of the agreement aforesaid. Lucinda E. Foreman wholly failed upon her part to carry out the aforesaid agreement in this: that on March 30, 1914, she entered into an unlawful and corrupt agreement with defendants for the purpose of preventing plaintiff from inheriting said farm of 226 acres; that in pursuance of such agreement on the date last aforesaid she executed to defendants William B. and Della Green a deed, whereby she conveyed to them 100 acres of said farm of 226 acres, subject to her life estate therein; that at the same time said Lucinda E. Foreman executed to appellant, Wilma N. Wright, a deed for 100 acres of the farm aforesaid, and placed such deed with her last will and testament; that she executed her will at the same time and therein provided that if she, the testatrix, died before Wilma N. Wright attained the age of twenty-one years, said deed should not be

delivered until she reached that age, and further provided that if said grantee died before she attained the age of twenty-one years, the deed should not be delivered, and should be destroyed by the executors of said will, in which event said real estate was to go to Barbara Nation and her children, the said Barbara being a sister of the testatrix; that in the event Wilma N. Wright attained the age of twenty-one years, the deed should be delivered to her and be recorded. It was further provided that the rents and profits of the 100 acres so conveyed to Wilma N. Wright should be used for her maintenance, support and education until she reached the age of twenty-one years. Appellees, Green and Green, were named executors of the aforesaid will and have taken and hold possession of all said farm of 226 acres. The will and deed aforesaid were executed for the fraudulent purpose of placing the property of the testatrix where Wilma N. Wright could not inherit the same, and to prevent her from obtaining the same in accordance with the agreement made as aforesaid at the time of her adoption by said Foreman.

The memorandum with each demurrer states (1) that the complaint shows upon its face that the contract sued upon is void under the statute of frauds; (2) that plaintiff shows that she has no title whatever in and to the real estate for which she sues.

Appellant cites and relies upon certain decisions by courts outside of Indiana as follows: *Horner v. Maxwell* (1915), 171 Iowa 660, 153 N. W. 331; *Quinn v. Quinn* (1894), 5 S. D. 328, 58 N. W. 808, 49 Am. St. 875; *Chehak v. Battles* (1907), 133 Iowa 107, 110 N. W. 330, 8 L. R. A. (N. S.) 1139, 12 Ann. Cas. 140; *Logan v. Wienholt* (1833), 7 Bligh (H. L.) 1; *Gregor v.*

Kemp (1722), 3 Swanst. 404. The foregoing decisions lend support to the general doctrine for which appellant contends with reference to the effect of a promise to make a child an heir, or to devise property, in consideration of the surrender by the natural parent of a child to be adopted by, or to live with, other persons as a member of their family.

But we do not find it necessary to determine whether the aforesaid decisions are applicable here for the reason that the identical questions presented

have been decided adversely to appellant's

1. contentions by our Supreme Court. The gist of the complaint is that in consideration of appellant's natural mother agreeing to her adoption by Lucinda E. Wright, the latter agreed "that the child should inherit from her the 226 acres of land which she owned. It is not averred that the agreement was in writing or that there was any memorandum thereof in writing, signed by Lucinda E. Wright, or by any other person authorized to act for her. The agreement, therefore, was in parol. Such an agreement is in law a contract for the sale of land, and falls within the prohibition of our statute of frauds.

The transaction is not taken out of the control of the statute by the performance on the part of the child, evidenced by its living with its adopted

2. parents in conformity with such an agreement. §7462 Burns 1914, §4904 R. S. 1881; *Baxter v. Kitch* (1871), 37 Ind. 554, 557; *Wallace v. Long* (1886), 105 Ind. 522, 526, 531, 5 N. E. 666, 55 Am. Rep. 222; *Austin v. Davis* (1891), 128 Ind. 472, 475, 478, 26 N. E. 890, 12 L. R. A. 120, 25 Am. St. 456; *Johns v. Johns* (1879), 67 Ind. 440, 444; *Neal v. Neal* (1880), 69 Ind. 419, 423; *Knepper v. Eggiman* (1911),

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177 Ind. 56, 63, 97 N. E. 161; *Hershman v. Pascal* (1891), 4 Ind. App. 330, 333, 30 N. E. 932.

It has also been decided that an agreement and the adoption of a child substantially as alleged in the complaint does not deprive the parents by

3. adoption of the right of absolute control and enjoyment of property owned or acquired by such persons, nor does it take away or limit his right to dispose of his property during life in such manner as he may choose. *Austin v. Davis, supra*, 476, 12 L. R. A. 120, and notes.

The general averment of fraud does not aid the complaint, since there are no facts averred which show fraud. *Lucinda E. Wright* (Foreman)

4. had the right to dispose of her property as she did, and the averments which show how she disposed of her real estate do not tend to support the charge of fraud. *Bennett v. McIntyre* (1889), 121 Ind. 231, 234, 23 N. E. 78, 6 L. R. A. 736; *Ray v. Baker* (1905), 165 Ind. 74, 83, 74 N. E. 619.

The court did not err in sustaining the demurrers to the complaint. Judgment affirmed.

NOTE.—Reported in 119 N. E. 379. Validity of oral agreement to devise land, 20 Ann. Cas. 1137; Ann Cas. 1915A 463. Right of adopted child to inherit from adopted parents, 39 Am. St. 225.

FISHER v. CAREY ET AL.

[No. 9,516. Filed April 23, 1918.]

1. **INJUNCTION.**—*Right to Relief.*—*Legal Remedy.*—Although a party may have a legal remedy, injunctive relief may be granted if that remedy is not as practicable, efficient and adequate as that afforded by equity, and whether a complaining party has a

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legal remedy which will afford complete justice must be determined under all the circumstances of the case and in view of the conduct of the parties. p. 442.

2. INJUNCTION.—*Right to Relief.—Multiplicity of Suits.*—Where there is a legal remedy, equity will frequently grant injunctive relief to prevent multiplicity of suits. p. 443.
3. INJUNCTION.—*Enjoining Trespass.—Complaint.—Sufficiency.*—In an action to enjoin defendant from using plaintiff's telephone line, and to recover damages for trespass, a complaint alleging that plaintiffs are the owners of a telephone line which defendant has no right or license to use, that he refused to desist in its use on their demand, that they cut his line and thereupon defendant reconnected the same, that he is threatening to use plaintiff's line continuously without right, and that such use has deprived and will continue to deprive plaintiffs of the use and enjoyment of their telephone line, showed a trespass continuous in its nature, which would furnish grounds for many actions at law, so that equity would grant injunctive relief to prevent a multiplicity of suits. p. 443.
4. PLEADING.—*Complaint.—Conclusions.—Construction.—Statute.*—A complaint which at least contains an adequate statement of conclusions is sufficient in the absence of a motion to require a statement of facts, under §343a Burns 1914, Acts 1913 p. 150, as to the construction of allegations in pleadings. p. 444.
5. PLEADING.—*Complaint.—Theory.*—A complaint should proceed upon some certain and definite theory which must be determined by its general scope and tenor. p. 444.
6. APPEAL.—*Review.—Theory of Case.*—Where the trial court construed a complaint as a cause in equity, seeking injunctive relief, so that plaintiff was not entitled to a jury trial, the court on appeal will adopt such construction, notwithstanding that the complaint is open to another interpretation equally as reasonable. p. 445.
7. TELEGRAPHS AND TELEPHONES.—*Enjoining Use of Telephone Line.—Damages.—Evidence.—Value of Use of Line.*—In an action to enjoin defendant from using plaintiff's telephone line, and to recover damages for trespass, it was not error for the trial court to permit one of the plaintiffs to testify what the uninterrupted use of the telephone line would be worth per month. p. 445.
8. APPEAL.—*Review.—Harmless Error.—Admission of Evidence.*—In an action to enjoin defendant from using plaintiff's telephone line, and to recover damages for trespass, even though evidence as to what the uninterrupted use of the telephone line would be worth per month was incompetent, its admission was harmless,

where no question as to the amount of damages recovered was presented by the motion for a new trial. p. 446.

9. **APPEAL.—Review.—Harmless Error.—Admission of Evidence.**—In an action to enjoin defendant from using plaintiff's telephone line, error, if any, in the admission of evidence as to defendant's general appearance on a certain occasion whether he was friendly or angry, was harmless. p. 446.
10. **EVIDENCE.—Opinion Evidence.—Competency.**—In an action to enjoin defendant from using plaintiff's telephone line, if the fact as to whether defendant appeared to be friendly or angry on a certain occasion was material, it was not error to permit a non-expert to testify to such fact, since it is competent for a nonexpert to give his opinion as to conduct and bearing, whether friendly or hostile. p. 446.
11. **APPEAL.—Review.—Evidence.—Weight and Sufficiency.**—Where there is some evidence to support every material fact necessary to plaintiff's right of recovery, the finding of the trial court based thereon is conclusive on appeal, though such evidence may be contradicted and not entirely satisfactory. p. 447.

From Howard Circuit Court; *William C. Purdum*, Judge.

Action by William W. Carey and another against Richard Fisher. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

Blacklidge, Wolf & Barnes, for appellant.

Joseph C. Herron, for appellees.

BATMAN, P. J.—This is an action brought by appellees against appellant to enjoin him from using a certain telephone line, and to recover damages for trespass. The complaint alleges, among other things, that appellees are the owners of a certain telephone line and attachments, which they have been using in connection with their farm residence, as a matter of convenience and enjoyment; that on the — day of October, 1914, before the bringing of this action, appellant, without right or license, attached a certain wire to their said telephone line for the purpose of

using a telephone in his residence over their said line; that such attachment rendered their said telephone worthless, and deprived them of the proper use and enjoyment of the same in their residence in this: that such attachment produced a constant ringing of their said telephone so that it could not be used by them; that, as soon as they learned that appellant had attached his telephone wire to their said telephone line, they cut appellant's said wire from the same and notified him that he should not further trespass on them in such manner; that appellant then notified them that he intended to use, and would use, their telephone line for his use as a telephone connection, whether they consented to such use or not; that thereafter, on October 9, 1914, appellant maliciously and without right again attached his said wire to their said line for telephone purposes; that on account of said attachment they had been compelled to forego the use of their said telephone, in their residence, and have lost the use and enjoyment thereof, to their damage in the sum of \$100. Appellees further aver that appellant is threatening to use their said telephone line without right; that to such end he has attached his telephone wire to their said line, as alleged above, and is threatening to use the same continuously for telephone purposes without regard to their rights and enjoyment; that such threatened use is wholly without right or license and is made purely from a spirit of mischief and malice and in disregard of their repeated protests against such use of their said property; that their damages for the continued use of their said telephone line by appellant, in the form and manner alleged, are irreparable on account of the inability to properly measure the same, and on

account of the multiplicity of suits. Prayer for injunctive relief and damages.

To this complaint appellant filed a demurrer for want of facts, which was overruled. The issues were then closed by a general denial. Appellant moved the court to submit the cause to a jury for trial. This motion was overruled, and the cause was tried by the court without the intervention of a jury, resulting in a judgment against appellant for \$5 and costs, and perpetually enjoining him from attaching any telephone wire to appellees' telephone line. Appellant's motion for a new trial was overruled, and he has assigned as the errors on which he relies for reversal that the court erred in overruling his demurrer to the complaint, and in overruling his motion for a new trial.

Appellant, in support of his first assigned error, contends that the complaint shows that the act which appellees seek to enjoin, constitutes but a single trespass, which had been committed before this suit was commenced; that it does not show that the alleged threatened trespass will cause irreparable damage, or that full and adequate compensation cannot be had in an action at law, or that there will be a multiplicity of suits if injunctive relief is not granted, and that by reason of such facts the court erred in overruling his demurrer thereto.

In considering this contention the following well-established rules should be borne in mind. Although a party may have a legal remedy, injunctive relief may be granted, if such legal remedy is not

1. as practicable, efficient, and adequate as that afforded by equity. *Cincinnati, etc., Railroad v. Wall* (1911), 48 Ind. App. 605, 96 N. E. 389; *Shedd*

Fisher v. Carey—67 Ind. App. 438.

v. *American Maize, etc., Co.* (1915), 60 Ind. App. 146, 108 N. E. 610. Whether a complaining party has a legal remedy which will afford complete justice must be determined under all the circumstances of the case, and in view of the conduct of the parties. *Drew v. Town of Geneva* (1898), 150 Ind. 662, 50 N. E. 871, 42 L. R. A. 814; *Hatfield v. Mahoney* (1906), 39 Ind. App. 499, 79 N. E. 408, 1086. Where there is

2. a legal remedy, equity will frequently grant injunctive relief to prevent a multiplicity of suits. *Knickerbocker Ice Co. v. Surprise* (1912), 53 Ind. App. 286, 97 N. E. 357, 99 N. E. 58; *Royer v. State, ex rel.* (1916), 63 Ind. App. 123, 112 N. E. 122, 113 N. E. 312. A threatened disturbance to an owner's right of possession has been held to authorize injunctive relief. *Miller v. Burket* (1892), 132 Ind. 469, 32 N. E. 309; *Brenner v. Heiler* (1910), 46 Ind. App. 335, 91 N. E. 744. Viewing the complaint in the light of these rules, we are led to conclude that it

3. is sufficient to authorize injunctive relief. It alleges in effect that appellees are the owners of the telephone line; that appellant had no right or license to use the same; that he refused to desist in its use on their demand; that they then cut said line and thereupon appellant reconnected the same; that he is threatening to use the same continuously without right, and that such use had deprived, and will continue to deprive, appellees of the use and enjoyment of their said telephone line. It thus appears that the acts of which complaint are made do not consist of a single isolated trespass, but a trespass continuous in its nature, which would furnish grounds for many actions at law. These allegations bring appellees well within the settled rule, stated by Pome-

roy in his work on Equity Jurisprudence, (4 Pomeroy, Eq. Jurisp. [3d ed.] §1357), as follows: "If the trespass is *continuous* in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive, and the legal remedy may therefore be adequate for each single act if it stood alone, then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions." This rule was quoted with approval in the case of *Wirrick v. Boyles* (1909), 45 Ind. App. 698, 91 N. E. 621.

It is further contended by appellant that the complaint cannot be sustained on the grounds that the threatened injury will be irreparable, or that a multiplicity of suits will result, because there is no sufficient averment of facts in that regard. An inspection of the complaint shows that, when fairly construed,

4. it at least contains a statement of conclusions in the particulars mentioned. This is sufficient in the absence of a motion to require a statement of facts necessary to sustain the same, under §343a Burns 1914, Acts 1913 p. 850. *Schlosser v. Nicholson* (1915), 184 Ind. 283, 111 N. E. 13; *Miller v. Gates* (1916), 62 Ind. App. 37, 112 N. E. 538. We therefore conclude there was no error in overruling the demurrer to the complaint.

Appellant assigned as one of its reasons for a new trial that the court erred in overruling its motion to submit the cause to a jury for trial. In sup-

5. port of this alleged error he insists that the complaint can only be sustained as an action to recover damages for an alleged trespass, and hence he was entitled to a trial by a jury. It is well settled

that a complaint should proceed upon some certain and definite theory, which must be determined by its general scope and tenor. *Lake Erie, etc., R. Co. v. Barnett* (1914), 56 Ind. App. 654, 105 N. E. 931; *Graham v. Henderson Elevator Co.* (1915), 60 Ind. App. 697, 111 N. E. 332. It is apparent that the trial court construed such complaint as a cause in equity

6. seeking injunctive relief. It was fairly open to such construction, notwithstanding the fact that it sought a judgment for damages already accrued from the commission of the alleged wrongful act. This being true, this court will adopt such construction on appeal, notwithstanding it may appear to be open to another interpretation equally as reasonable. *Gülchrist v. Hatch* (1915), 183 Ind. 371, 106 N. E. 694, Ann. Cas. 1917E 1030; *Euler v. Euler* (1913), 55 Ind. App. 547, 102 N. E. 856; *Cincinnati, etc., R. Co. v. Gross* (1917), 186 Ind. 471, 114 N. E. 962; *Grand Trunk, etc., R. Co. v. Thrift Trust Co.* (1917), 68 Ind. App. 198, 115 N. E. 685. Actions for injunctions are not triable by a jury. *Helm v. First Nat. Bank, etc.* (1883), 91 Ind. 44; *Pence v. Garrison* (1884), 93 Ind. 345; *Small v. Binford* (1907), 41 Ind. App. 440, 83 N. E. 507, 84 N. E. 19. We therefore conclude that the court did not err in denying appellant a trial by a jury.

Appellant bases error on the action of the court in permitting appellee, William W. Carey, to testify what the uninterrupted use of the telephone line

7. in question would be worth to him per month.

The court did not err in permitting such evidence. It has been held that, in cases involving the deprivation of the use of property, the damage is its rental value, if it has a rental value, but, if not, then

the value of its use to the injured party for the time he was deprived of its use is the measure of damages. 8 R. C. L. 490, §51; *Standard Supply Co. v. Carter* (1908), 81 S. C. 181, 62 S. E. 150, 19 L. R. A. (N. S.) 155. Moreover, if it be conceded that such evidence

is incompetent, it was nevertheless harmless,

8. as it only bears upon the question of the amount of appellees' damages, and no question in that regard was presented by the motion for a new trial. *Pittsburgh, etc., R. Co. v. Macy* (1915), 59 Ind. App. 125, 107 N. E. 486; *Peabody, etc., Coal Co. v. Yandell* (1912), 179 Ind. 222, 100 N. E. 758.

Appellant also bases error on the action of the court in permitting appellee, Laura B. Carey, to testify as to appellant's condition and general

9. appearance on a certain occasion, whether he was friendly or angry. Appellant contends that such evidence is immaterial and therefore incompetent. But conceding that it is immaterial, it is of such a character as to be clearly harmless, and hence there was no error in its admission. *Indiana Union Traction Co. v. Hiatt, Admr.* (1917), 65 Ind. App. 233, 114 N. E. 478, 115 N. E. 101, and authorities there cited. But if the facts to which such testimony was directed had been material, there would have

10. been no error in its admission, under the well-established rule that it is competent for non-expert witnesses "to give their opinion on questions of identity, resemblance, apparent condition of body and mind, intoxication, insanity, sickness, health, value, conduct and bearing, whether friendly or hostile, and the like." *Johnson v. Thompson* (1880), 72 Ind. 167, 37 Am. Rep. 152; *Carthage Turnpike Co. v. Andrews* (1885), 102 Ind. 138, 1 N. E. 364, 52 Am.

Rep. 653; *Louisville, etc., R. Co. v. Wood* (1888), 113 Ind. 544, 14 N. E. 572, 16 N. E. 197.

Appellant also contends that the decision of the court is not sustained by sufficient evidence, and is contrary to law. In support of this contention

11. he urges, among other things, that the evidence shows, either that appellant and appellees were tenants in common of the telephone line in question, or that appellant had license to use the same. In considering this contention we find that the evidence is in part and conflicting. Under such circumstances the only question we are called upon to determine in that regard is whether there was any evidence to sustain the decision of the court. This is true, although such evidence may be strongly contradicted and not entirely satisfactory. *Thompson v. Beatty* (1908), 171 Ind. 579, 86 N. E. 961; *Warner v. Jennings* (1909), 44 Ind. App. 574, 89 N. E. 908; *Hollingsworth v. Hollingsworth* (1911), 50 Ind. App. 137, 98 N. E. 79; *Public Utilities Co. v. Cosby* (1915), 60 Ind. App. 252, 110 N. E. 576. There was some evidence to support every material fact necessary to appellees' right of recovery. The trial court has passed upon its weight, and this court is bound thereby.

We find no reversible error in the record. Judgment affirmed.

NOTE.—See under (1) 22 Cyc 771; (2) 22 Cyc 766; (10) 17 Cyc 91. Injunction against trespass to land, 199 Am. St. 731; injunction as remedy for continuing or repeated trespass, 15 Ann. Cas. 1235.

RESERVE LOAN LIFE INSURANCE COMPANY v. ROOT ET AL.

[No. 9,524. Filed April 24, 1918.]

1. INSURANCE.—*Life Insurance.—Action on Policy.—Parties.—Widow of Insured.—Legal Heir.*—A woman entitled to share as a distributee of her husband's personalty is within the term "legal heirs" as used in life insurance policies, and was properly joined as a party plaintiff in an action on a life policy. p. 451.
2. INSURANCE.—*Life Insurance.—Representations.—Fraud.—Condition of Health.—Medical Attendance.*—Where a life insurance policy provided that, in the absence of fraud, statements made by insured in answer to questions in the application should be deemed representations, and the application contained an agreement that answers therein were material to the risk, a statement made by insured that he had never consulted a doctor, when he had in fact been treated several years previous by a physician for la grippe, sour stomach and heartburn, did not necessarily show fraud, since insured might honestly have interpreted the questions as inquiring whether he had been treated for a serious disease. p. 452.
3. TRIAL.—*Special Findings.—Failure to Find.—Remedy.—Motion for New Trial.*—Where there is proof pertinent to an issue on which the court ought to have found facts which are not found, the remedy must be by a motion for a new trial on the ground that the finding is contrary to law, as a failure to find such facts thereby impliedly finds that they are not proved. p. 454.
4. INSURANCE.—*Life Insurance.—Action on Policy.—Representations.—Fraud.—Evidence.—Sufficiency.*—In an action on a life insurance policy, where insured had stated in his application that he had never been treated by a physician, the evidence was sufficient to sustain a finding to that effect, though insured had in fact been treated by a doctor some years previous for la grippe, sour stomach and heartburn, there being testimony that such ailments were temporary and would not seriously impair the health. p. 455.

From Monroe Circuit Court; *Robert W. Miers*, Judge.

Action by Mary Root and others against the Reserve Loan Life Insurance Company. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

Guilford A. Deitch, Frank G. West and Theodore J. Loudon, for appellant.

Robert L. Mellen and Rufus H. East, for appellees.

IBACH, C. J.—Appellees recovered a judgment against appellant on a policy of life insurance issued to Joseph P. Root, their husband and father. The cause was tried by the court without the intervention of a jury, and upon request a special finding of facts was made and conclusions of law stated thereon.

The errors assigned call in question the overruling of appellant's demurrer to the complaint, the correctness of the conclusions of law, and the overruling of its motion for a new trial.

The court finds the facts to be substantially as follows: On May 31, 1912, Joseph P. Root, then a resident of Centralia, Oklahoma, made an application in writing to the appellant company for an insurance policy of \$1,000. The policy issued on said application was received and accepted by the insured. At the time of the issuance and delivery of the policy the insured was alive and in apparent good health. The annual premium on the policy was \$53.60. On May 31, 1912, the insured paid to Ray and Hostetler, soliciting agents of appellant, \$3.60 in cash and executed and delivered to them his note of that date for \$50 due January 1, 1913, and providing for ten per cent. interest. Appellant received the first annual premium in advance. Ray and Hostetler paid it to J. D. Edmundson, at the time state agent of appellant company for the State of Oklahoma, and said Edmundson paid the same to appellant and appellant accepted it. The note was not paid and is now unpaid. The insured died April 30, 1913, in Lawrence

county, Indiana, near Tunnelton. He left as his legal heirs, Mary Root, his widow, and six children, naming them, and no other. Five of the children were minors and their mother was appointed their guardian. On May 19, 1913, appellees furnished appellant proofs of death of the insured and proofs of their interest as claimants, which proofs, as well as a copy of the application and policy, are made a part of the finding. On June 10, 1913, appellant tendered to the mother the amount of the first annual premium with interest, and to Oren Root, one of the children, \$8.15 for the first annual premium on said policy with interest. The policy has not been paid. Appellant paid to the Monroe Circuit Court \$3.60 and delivered to the clerk the \$50 note given by the insured to Ray and Hostetler on May 31, 1912. Once about seven or eight years prior to the finding the insured had heartburn and called upon and got some tablets therefor from Dr. Andrews. In the year 1909, the insured had a sour stomach and received medicine therefor from Dr. Matlock. In the winter of 1910 the insured had a slight attack of la grippe and called upon Dr. Matlock, for which he received medicine from Dr. Matlock. Appellant did not learn that the insured had suffered from heartburn or la grippe or had called upon a physician until May 24, 1913. Each of these were temporary indispositions in their nature, and the insured immediately apparently completely recovered from each of them, and appeared sound and well. Neither of them seemed to affect the general soundness and healthfulness of his system, nor tended to undermine or weaken his constitution. There was no fraud in the application for said insurance.

The court concluded upon these facts that the law

was with appellee, and that they were entitled to recover \$1,107.50 and costs. Appellant filed a motion for new trial, which was overruled.

The only question raised against the sufficiency of the complaint is that Mary Root, the widow, was not a "legal heir" of her husband, and was therefore improperly joined as a party plaintiff.

A widow, while not strictly an heir of her deceased husband in many instances, falls within the designation of heirs. *Glass v. Davis* (1889), 118 Ind.

1. 593, 21 N. E. 319; *Wiseman v. Wiseman* (1880), 73 Ind. 112, 38 Am. Rep. 115. But even though she may not be a "legal heir" by virtue of her right as widow to share in the estate of the assured, yet, if she is entitled to share as distributee of her husband's personalty, she is within the term "legal heirs," as used in life insurance policies. *Anderson v. Groesbeck* (1899), 26 Colo. 3, 55 Pac. 1086; *Lyons v. Yerex* (1894), 100 Mich. 214, 58 N. W. 1112, 43 Am. St. 452; 25 Cyc 888. The complaint was not insufficient in this regard.

As material to the questions presented, we set out certain provisions of the application and policy of insurance. The application contains the following:

"I hereby agree that each statement made herein and in Part 2 of this application by whomsoever they be written are full, true and complete, and that each of the same is material to the risk. (Part 2.) * * * 5. Are you now in sound health? Yes. * * * 14. Have you ever had any of the following diseases? (e) Dyspepsia or indigestion? No. * * * 17. Except as you have previously stated, for what have

you ever consulted a physician or surgeon? Nothing.”

Said application further provides:

“I hereby agree * * * that the policy shall not take effect unless I am alive and in good health at the time of its delivery to me; nor then unless the first premium is paid in cash or a note for extension of time for such payment is accepted by the company.”

The policy contains the following provision:

“All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no statement made by the insured shall avoid this policy unless it is contained in the written application therefor.”

It is first insisted that the conclusions of law are erroneous in that the facts do not show that a prepayment of premium was waived. Under the facts found this was not necessary. The finding is that the premium was paid in advance and received and accepted by appellant.

Appellant further contends that the conclusions of law are erroneous, in that it appears from the findings that the insured suffered an attack of la grippe,

2. for which he consulted a physician and received medicine; that having denied consulting any physician for anything, having agreed that the statements in the application were material, and appellant having no knowledge of the facts concealed, the conclusions of law should have been in its favor.

This court in a recent case (*Prudential Life Ins. Co. v. Sellers* [1913], 54 Ind. App. 326, 102 N. E. 894),

had occasion to consider a similar contract and certain alleged fraudulent answers in the application therefor, and we there held that a question in an application, as to whether the applicant had been attended by a physician within three years for any complaint, might be honestly interpreted to mean a treatment for any serious disease, and that her answer that she had not, under the evidence, warranted the jury in finding that her answer was substantially true.

In that case the inquiry was limited to three years, while in the instant case it covered applicant's entire life, which would be only a better reason for the application of the principle here. The language of the contract in that case as in the present contract expressly provided that all statements made by the insured in the absence of fraud should be deemed representations and not warranties. The trial court expressly found that there was no fraud in the application for said insurance, and therefore the answers must be construed as representations, and as such it is only necessary that they be substantially true. *Prudential Life Ins. Co. v. Sellers, supra.*

The finding of facts shows that the consultations with Drs. Andrews and Matlock were for temporary indispositions in their nature and did not affect the general soundness and healthfulness of the insured, nor weaken his constitution.

The facts found are admitted to be true for the purpose of the exceptions to the conclusions of law. We hold therefore that upon the effect of the answers to the questions in the application, the facts of this case are controlled by the law as laid down in the case cited, and that the court did not err in its con-

clusions of law on the facts found. See, also, *Metropolitan Life Ins. Co. v. Johnson* (1911), 49 Ind. App. 233, 94 N. E. 785.

It is finally insisted that the decision of the court is contrary to law. This contention is based upon the principle of law that, where there is proof per-

3. tinent to an issue on which the court ought to have found facts which are not found, the remedy must be by a motion for a new trial on the ground that the finding is contrary to law, as a failure to find such facts thereby impliedly finds that they are not proved and in such respect the finding is clearly contrary to law. *Ex parte Walls* (1880), 73 Ind. 95, 110.

There is evidence in the record that the insured was in apparent good health at the time of the application; that he was in *good health* at the time the policy was delivered; and that the appellant company received and accepted settlement in full for the first premium. The soliciting agent of appellant company testified that the insured was in apparent good health at the time of making his application and was in *good health* at the time the policy was delivered. The examining physician for appellant company, and still employed by it, testified that the tests and examinations made by him showed the insured to be in *good physical condition* and revealed no disease or ailments of any kind and his lungs and stomach appeared sound and that he pronounced him a number one insurance risk.

The Dr. Matlock referred to in the finding testified that he treated the insured in 1909 for a *temporary ailment* of the stomach from which he recovered. "He did not come back a second time." That in 1910 he

went to insured's home to see him; that the insured had what is commonly called the "grippe"; that he saw the insured three times, gave him the usual remedy for that malady; saw him afterwards. He had recovered from it. The matters were temporary ailments and he yielded readily to treatment. The ailments did not in any way affect or impair his constitution. "A man who has once had la grippe would *possibly* be more apt to take it than one who had never had it. I would not be able to say that the attack of la grippe that I treated Mr. Root for would have any particular effect on his next attack. I would not say that one that has had a *severe* attack of grippe is more apt to have an attack of grippe than one who has never had it."

Dr. Andrews testified that he treated the insured in 1907 and 1908 for heartburn, which is nothing more or less than a sour stomach. "There is nothing serious about that kind of trouble. Most everybody has it. Heartburn is a mere symptom. The remedy given corrected the symptom." Witness saw the insured along until he moved away in 1912, and so far as he knew there was no subsequent trouble.

Dr. Truit, as a witness for appellant, testified that the physical condition of the insured would *largely* determine his insurability. Not every applicant having suffered from heartburn or la grippe would be rejected. If an applicant had fully recovered from la grippe, his application would not be rejected.

Without setting out more of the evidence, it is sufficient to say that there is evidence tending to

4. support the decision of the trial court, under the principles of law heretofore announced,

and hence the court did not err in overruling the motion for a new trial.

Judgment affirmed.

NOTE.—Reported in 118 N. E. 917. Insurance: who are "heirs" within meaning of life policy, 30 L. R. A. 593; effect of honest mistake in answer as to health of insured warranted by him to be true, 15 L. R. A. (N. S.) 1277; what constitutes "attendance of physician" in representation by applicant for life insurance, 3 Am. St. 637. See under (1) 25 Cyc 888, 915; (2) 25 Cyc 817; (3) 25 Cyc 944.

HAINES v. TRUEBLOOD ET AL.

[No. 9,922. Filed April 24, 1918.]

1. **DRAINS.—Establishment.—Petition.—Requisites.—Drainage Commissioners.—Report.—Statute.**—While under §6141 Burns 1914, Acts 1907 p. 508, §2, a petitioner for drainage is required to state generally in his petition his belief respecting the best and cheapest manner in which the proposed drainage may be accomplished, such statement is not binding on the drainage commissioners, since they are required, in case they report in favor of the drainage, to determine all questions of terminus, route, location, etc., of the proposed work, subject, however, to the ultimate determination of the court. p. 461.
2. **PLEADING.—Pleading Conclusions.—Sufficiency.—Statute.**—Under §343a Burns 1914, Acts 1913 p. 850, as to the construction of pleadings, the pleader's conclusions must be construed, in determining the sufficiency of a pleading, as equivalent to the averment of all the facts required to sustain such conclusions. p. 462.
3. **DRAINS.—Establishment.—Rights of Landowners.—Petition.—Remonstrance.—Statutes.**—Under §§6141, 6143 Burns 1914, Acts 1907 p. 508, §§2, 4, a petitioner ordinarily has as strong a right to petition for drainage as has a landowner to remonstrate against it, and neither may be heard to complain that the other has exercised the right granted him by statute. p. 462.
4. **DRAINS.—Establishment.—Legal Remedy to Prevent.—Remonstrance.—Prima facie** the statute (§6141 *et seq.* Burns 1914, Acts 1907 p. 508) affords owners of lands within a drainage district, although not named in the petition, a full and adequate legal rem-

edy by remonstrance; and even though there is no remonstrance, or if one is filed and overruled, the establishment of the proposed drainage does not necessarily follow. p. 463.

5. DRAINS.—*Establishment.—Remonstrance.—Right to Drainage.*—Landowners by repeatedly remonstrating against a drainage petition repeatedly filed, and thus successively preventing its reference to the drainage commissioners and procuring its dismissal, do not thereby deprive the petitioners of any right, since there is no absolute right to drainage under any particular petition directed to any particular physical situation. p. 463.
6. INJUNCTION.—*Right to Relief.—Adequate Legal Remedy.*—That there is a remedy at law is not alone enough to defeat injunction, but the legal remedy must be as plain, complete and adequate as the remedy in equity. p. 465.
7. DRAINS.—*Establishment.—Remonstrance.—Equitable Relief.*—In the case of an ordinary petition for drainage the legal remedy by remonstrance is fully adequate, and for that reason alone recourse to equity to enjoin the establishment of the drain should be denied. p. 465.
8. INJUNCTION.—*Right to Relief.—Adequacy of Legal Remedy.—Determination.*—In determining the adequacy of legal remedies, some weight is given the fact, if it exists, that such remedies are vexatiously inconvenient, or that a denial of equitable relief results in irritation, annoyance and embarrassment which might be relieved by its application. p. 465.
9. INJUNCTION.—*Grounds.—Multiplicity of Suits.*—Equity may be invoked to prevent a multiplicity of suits or for the purpose of suppressing litigation when otherwise there would be actions at law unnecessarily or burdensomely numerous. p. 466.
10. INJUNCTION.—*Grounds.—Establishment of Drain.*—Where a landowner fraudulently joined with his attorney in filing repeated and vexatious petitions for the establishment of a drain in order to enable the attorney to collect fees and to repeat the filing of the petition until the opposition would fail to file a remonstrance, the adverse landowners were entitled to injunction restraining the repeated filing of such petition. p. 466.

From Madison Superior Court; *Willis S. Ellis*, Judge.

Action by Edward Haines against William N. Trueblood and others. From a judgment for defendants, the plaintiff appeals. *Reversed.*

Kittinger & Diven, for appellant.

Arthur C. Call, for appellees.

CALDWELL, J.—Appellant brought this suit to procure a decree enjoining appellees from proceeding further with a certain petition and from filing other petitions for the drainage of lands in Madison county. Judgment that he take nothing, and for costs, was rendered against him by reason of his refusal to plead over on the sustaining of a demurrer to his complaint. It is alleged in the complaint that appellant owns lands that would be affected by the proposed drainage, and that he sues in behalf of himself and also at the request, and for the benefit, of a large number of other landowners situated similarly to himself and so numerous as to render it impracticable to bring them all before the court.

The complaint covers twelve pages of the transcript. A brief summary of the substantial facts disclosed by it is as follows: Appellee Trueblood owns a seven-acre tract of land in Madison county which drains naturally, and in fact is drained into Fall creek, and which will not be affected or benefited by a drainage system in or along Lick creek. Trueblood and an attorney who represented him as such in all the drainage proceedings hereinafter mentioned, fraudulently confederated together for the purpose of procuring the widening, deepening and straightening of Lick creek between certain points, under the drainage laws of the state, their purpose being to procure for Trueblood's attorney an allowance of a large amount of attorney fees. The proposed drainage would cost many thousands of dollars, and would affect the lands of 700 landowners who do not want or need the proposed drainage. Trueblood hopes

and intends to accomplish his purpose by repeatedly filing other petitions in succession as those theretofore filed are dismissed one by one by reason of the filing of remonstrances under the statute by two-thirds of the landowners affected, and this he declares he will continue to do until the opposing landowners have become weary of the contest and therefore cease resistance.

On July 26, 1913, Trueblood, with others procured by him, filed in the Madison Circuit Court a petition for the drainage of his said lands, by the dredging, widening, deepening and straightening of Lick creek between certain points. Within the time fixed by the statute, about 600 landowners of the class authorized by the statute to do so, and being more than two-thirds of such class, filed a remonstrance against the proposed drainage, whereupon petitioners dismissed the petition, and on the same day filed a second petition of like import as the first, to which within the time specified by statute there were filed remonstrances signed by more than 700 qualified landowners and being more than the two-thirds necessary to procure a dismissal of the petition. Trueblood thereupon having caused a third petition of like nature as the first and second to be prepared, filed it also, and two days later dismissed the third petition. At this stage of the proceedings this action was commenced. Subsequently a supplemental complaint was filed, alleging among other things the filing of a remonstrance by appellant and more than 600 other landowners against the drainage proposed by the third petition, the dismissal of the third petition by reason of the remonstrance, and that appellees thereupon

filed a fourth petition, the same in substance as those that preceded it.

The complaint contains other averments of facts to the effect that each of such petitions was fraudulently prepared and filed; that appellees were able to file successive petitions at comparatively small expense to themselves, but that the work of causing successive remonstrances to be prepared, signed and filed is very expensive to the landowners, both in money and time; that in each of such petitions appellees named only from twenty to forty landowners as likely to be affected by the proposed drainage, and that with knowledge of the facts they omitted therefrom 600 to 700 other landowners whose lands will be affected by the drainage if accomplished; that said petition in each case was pestiferous, and was not prosecuted to secure drainage, but for the fraudulent, corrupt and sole purpose of extracting money from landowners to pay said attorney and Trueblood and others a large amount as attorney fees, to be derived from assessments for said improvement, and that the fraudulent and corrupt confederation between Trueblood and his attorney was entered into and is being carried out for that purpose alone, and that each of the petitions was filed for that purpose and for no other or different purpose; that the proceeding is therefore unlawful, wrongful and oppressive; that by virtue of said confederation and their said fraudulent and successive actions pursuant thereto. Trueblood and his attorney intend to harass and hope to wear out the opposition of the landowners and entail upon them such constantly recurring trouble and expense in remonstrating that eventually they will grow weary and permit the drainage to be accomplished, and that

Trueblood declares that he will continue in his said fraudulent and oppressive course until such end is attained; that the proceeding has become pestiferous, wrongful and oppressive; that, in the event of such drainage, Trueblood's assessment will be small and will be paid out of fees allowed his attorney. As to appellees other than Trueblood it is alleged that, while not named in the successive petitions as landowners, they signed a statement on a separate page of certain of the petitions to the effect that they owned certain undescribed lands that would be affected by the proposed drainage, and they therefore prayed that it be established. It is alleged also that they participated in some of Trueblood's alleged fraudulent conduct with knowledge of the facts. The relief sought by the complaint is that appellees be enjoined from proceeding further with the pending drainage petition, and from filing other petitions for the drainage of Trueblood's lands.

It is alleged in substance that the description of the proposed drainage improvement as contained in the successive petitions differed somewhat in termini, but that each and all of the petitions would have directed the attention of the ditch commissioners to the same physical situation, had such petitions been submitted to them for view and report, and that the landowners likely to be affected were practically the same in each case.

The fact that such descriptions do differ as indicated is, however, unimportant. While a petitioner for drainage is required to state generally in

1. his petition his belief respecting the best and cheapest manner in which the proposed drainage may be accomplished, such belief so stated is not

binding on the drainage commissioners, since they are required, in case they report in favor of the drainage, to determine all questions of termini, route, location, etc., of the proposed work, subject, however, to the ultimate determination of the court in certain particulars. §§6141-6143 Burns 1914, Acts 1907 p. 508, §§2-4.

The complaint contains certain averments in the nature of conclusions. These, however, as against demurrer and to the extent necessary to its

2. sufficiency, must be held to be equivalent to the averment of all the facts required to sustain such conclusions. §343a Burns 1914, Acts 1913 p. 850.

The right to petition for drainage is a statutory right. §6141, *supra*. Appellees, therefore, were authorized to petition for the drainage involved

3. here. In case drainage petitioned for is established, the statute provides for an allowance of fees to petitioners' attorneys, payable out of the assessments, the amount of the latter regulating the amount of the former. §6144 Burns 1914, *supra*. Likewise the right to remonstrate by numbers is a statutory right. The statutory provision is to the effect that, if within a specified time two-thirds in number of the landowners named as such in the petition, or who may be affected by any assessment or damages, and who live in the county or counties where the lands affected are situated, shall remonstrate in writing against the construction of the drainage, the petition shall be dismissed. §6142, *supra*. It thus appears that at least in any ordinary case a petitioner has as strong a right to petition for drainage as has a landowner to remonstrate against it, and that neither the former nor the latter may be heard

to complain of the other that he has exercised the right granted him by statute.

It may be said also that *prima facie* it appears that the statute affords to landowners of the class indicated, although not named as such in the peti-

4. tion, a full and adequate legal remedy. Moreover, while the right to remonstrate by numbers is a statutory right, the failure to remonstrate does not necessarily lead to the establishing of the proposed drainage. The only effect of the failure of a sufficient number of authorized landowners so to remonstrate is the reference of the petition to the drainage commissioners when the court finds it to be sufficient. If the drainage commissioners on such submission determine in the negative any one of several questions, the petition must be dismissed. But, as we have said, even though the drainage commissioners report in favor of the proposed drainage, it rests with the court to determine ultimately, when properly presented, whether the drainage as reported shall be established, or whether the proceeding shall fail. §6142, *supra*.

It thus appears that there is no such thing as an absolute right to drainage under any particular petition directed to any particular physical situa-

5. tion. Drainage sought by petition may be defeated by a remonstrance, by a report, or by the determination of the court. There is no absolute right to have a drainage petition drawn with reference to a certain topographical location, referred to the drainage commissioners. There is no such right at all where landowners of the class and in the numbers specified stand in opposition to the proposed improvement, and indicate their opposition as pre-

scribed. Where opposition is so indicated, it serves merely to inform the court that the right to have the petition referred for report does not exist. It therefore follows that landowners, by repeatedly remonstrating against a petition repeatedly filed, and thus successively preventing its reference and procuring its dismissal, do not thereby deprive the petitioners of any right. They thereby merely demonstrate that what is sought as an advantage does not exist as a right.

Such is the case here: Under the allegations of the complaint the requisite number of qualified landowners are opposed to the drainage improvement. They have repeatedly demonstrated their opposition in the statutory manner. They stand ready to continue to do so, if need be. They have thereby established and are ready to continue to establish that the right does not exist in appellees to have the petition here referred. To do so, however, requires in each case much labor and the expenditure of large amounts of money. But appellees declare that they will create in themselves the semblance of a right by compelling the landowners through utter weariness to abstain from filing remonstrances. A petition is filed; it is dismissed by reason of a remonstrance; its practical similitude is at once again filed, followed by another remonstrance, and thus a contest in endurance goes on, the one party seeking to create the equivalent of a right by compelling the other party to forego a right. The one party seeks to create the semblance of a right, not because the natural fruits thereof are desired, but for certain improper purposes, to be attained by improper means exercised in an improper spirit. May such a contest proceed with-

out limitation? Is the arm of equity long and strong enough to intervene?

As we have said, appellant and the other landowners involved have a remedy at law by reason of the statutory right to remonstrate. However, "It

6. is not enough to defeat injunction that there is a remedy at law. It must be as plain, complete, and adequate—or, in other words, as practical and efficient to the ends of justice and its prompt administration—as the remedy in equity." *Meyer v. Town of Boonville* (1903), 162 Ind. 165, 70 N. E. 146.

As measured by the foregoing limitation, there can be no doubt that in case of the ordinary petition for drainage, the legal remedy by remonstrance

7. is fully adequate, and that on account of the existence of such remedy, if for no other reason, recourse to equity should be denied. Here, however, we are not dealing with an ordinary proceeding for drainage.

In determining the adequacy of legal remedies and the consequent superiority of equitable remedies,

some force is given to the fact, if it exists, that

8. the former are vexatiously inconvenient, or that a denial of the latter results in irritation, annoyance and embarrassment readily relieved by the application of such remedy. 10 R. C. L. 278; *Fitzmaurice v. Mosier* (1888), 116 Ind. 363, 16 N. E. 175, 19 N. E. 180, 9 Am. St. 854.

"In cases where the oppressive character of the litigation involved throws upon the plaintiff an unusual and unconscionable expense and annoyance, equity has jurisdiction to remove a cloud upon his title, notwithstanding a remedy exists at law." *Town*

of *Corinth v. Locke* (1890), 62 Vt. 411, 20 Atl. 809, 11 L. R. A. 207.

Likewise equity may frequently be invoked to prevent a multiplicity of suits (*Royer v. State, ex rel.* [1916], 63 Ind. App. 123, 112 N. E. 122, 113

9. N. E. 312), or for the purpose of suppressing litigation when otherwise there would be actions at law unnecessarily or burdensomely numerous. *Lewis v. Rough* (1866), 26 Ind. 398.

These principles seem to be applicable to the situation here. The successive filing of the petition for drainage under the circumstances presented by

10. the complaint, rendering necessary the repeated preparation and filing of remonstrances, unless the landowners abandon a statutory right, and especially in view of the declared purpose to continue the filing of such petition as often as it meets with an enforced dismissal, and until all opposition is destroyed, presents a case of multiplicity in legal procedure at once irritating, annoying and vexatious, and apparently unjustifiably so, in a high degree.

We have discovered no decision bearing directly on the question of the right to injunctive relief under the specific facts presented by the complaint. We may obtain some light, however, from a consideration of analogies. Thus, after the introduction of the remedy in ejectment to try titles to real estate, it was the doctrine of the common law that one might resort to that remedy as often as he pleased to try his title. Thereupon courts of equity extended to parties litigant a remedy through a bill of peace that they might be relieved from the inconvenience and annoyance of constantly repeated actions in ejectment, and that the questions in dispute might be determined once for

all. 10 R. C. L. 282; 14 R. C. L. 348. A bill of peace is defined as "a bill filed in equity, praying for an injunction to stay a large number of separate suits involving the same right, or to prevent the vexatious recurrence of inconclusive litigation of the same right, and to adjudicate finally the whole controversy in the one suit. It is designed to secure repose from perpetual litigation." 3 Ency. Pl. and Pr. 556. That there is a close analogy between the situation here and the circumstances under which the application of one class of bills of peace might be invoked is apparent.

Likewise, for an ordinary trespass the law affords an adequate remedy in damages. The courts recognize, however, that an act of trespass may be so frequently repeated, and so continuously persisted in that such a remedy becomes inefficient, thereby arousing equitable jurisdiction and calling for the application of equitable remedies. Thus, "if the trespass is *continuous* in its nature, if repeated acts of wrong are done or threatened, although each of these acts, taken by itself, may not be destructive and the legal remedy may therefore be adequate for each single act *if it stood alone*, then also the entire wrong will be prevented or stopped by injunction, on the ground of avoiding a repetition of similar actions." 4 Pomeroy, Eq. Jurisp. (4th ed.) §1357. That courts frequently apply equitable remedies in case of repeated trespasses is well settled. See the following: *Wirrick v. Boyls* (1909), 45 Ind. App. 698, 91 N. E. 621; *Knickerbocker Ice Co. v. Surprise* (1912), 53 Ind. App. 286, 97 N. E. 357, 99 N. E. 58; *Haines v. Hall* (1888), 17 Ore. 165, 20 Pac. 831, 3 L. R. A. 609, and

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note; *Town of Corinth v. Locke, supra*, and note; 10 R. C. L. 282.

While the foregoing authorities do not bear directly on the question here, we believe that the remedy there applied is broad enough to include the situation presented by the complaint in the case at bar, and that under the facts the appellant is entitled to equitable relief. It results that the court erred in sustaining the demurrer to the complaint.

The judgment is reversed, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

NOTE.—Reported in 119 N. E. 383.

DAUB ET AL. v. VAN LUNDY.

[No. 9,419. Filed December 18, 1917. Rehearing denied April 24, 1918.]

1. **APPEAL.—Review.—Ruling on Motion to Vacate Judgment.**—A motion to vacate a default judgment, filed at the same term at which such judgment was rendered, is a part of the proceedings of the cause, and the ruling thereon, having properly been assigned as error, calls for consideration on appeal. p. 473.
2. **JUDGMENT.—Default.—Setting Aside.**—Section 405 Burns 1914, §396 R. S. 1881, imposes an imperative duty on the court to relieve a party from a judgment against him, through his mistake, inadvertence, surprise or excusable neglect, where such facts are made to appear to the satisfaction of the court. p. 473.
3. **APPEAL.—Review.—Ruling on Motion to Set Aside Default.—Evidence.—Verified Motion.—Consideration.**—A verified motion to set aside a default partakes of the nature of a deposition and parol testimony, and is within the rule against weighing evidence on appeal. p. 473.
4. **APPEAL.—Review.—Evidence.—Sufficiency.**—A decision of the trial court on a motion to set aside a default judgment will not be disturbed on appeal, where there is evidence to sustain it. p. 474.

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5. **APPEAL.—Review.—Ruling on Motion to Set Aside Default Judgment.—Evidence.—Sufficiency.**—Where it appeared from a verified affidavit to set aside a default judgment that such judgment was entered after failure of affiant's attorneys to comply with a rule absolute to answer, a mere showing that affiant's attorneys had entered into an agreement outside of court with an attorney of the opposing party granting further time to comply with the rule, was insufficient to show mistake, surprise, inadvertence or excusable neglect entitling affiant to relief under §405 Burns 1914, §396 R. S. 1881. p. 474.
6. **JUDGMENT.—Default.—Motion to Set Aside.—Requisite.—Showing of a Valid Defense.**—Under §405 Burns 1914, §396 R. S. 1881, providing that a party may be relieved from a judgment taken against him through mistake, inadvertence, surprise or excusable neglect and requiring a showing of a valid defense to the action, a verified motion to set aside the judgment based on the fact that the real estate involved in the mortgage foreclosure by default was conveyed to affiants by plaintiff's mortgagor as part of a fraudulent transaction, and that the realty involved never belonged to affiants, without any showing as to the nature of the fraud or the parties thereto, was properly overruled as not showing a valid defense to the foreclosure proceedings. p. 475.

From St. Joseph Superior Court; *George Ford*, Judge.

Action by Oscar Van Lundy against Mary E. Daub and another. From a judgment for plaintiff, the defendants appeal. *Affirmed.*

Lenn J. Oare and *Russell W. Geyer*, for appellants.
Guy & Pattee, for appellee.

BATMAN, P. J.—Appellee filed his complaint against appellants in the St. Joseph Superior Court on January 16, 1915, to foreclose a mortgage on certain real estate. On the same date appellants were duly served with process requiring them to appear thereto on the 29th day of said month. On April 16, the same being the fifty-first judicial day of the February term, 1915, of said court, they were defaulted, and judgment was rendered against them in favor of appellee.

On April 28, the same being the sixty-first judicial day of said February term, 1915, of said court, appellants filed their verified motion to set aside the default and vacate said judgment as follows:

“Comes now the defendants in the above entitled cause and move the court to set aside the default and judgment against them for the reasons as follows: that the default and judgment herein was taken against them through their mistake, inadvertence and excusable neglect, in this: that on the 13th day of April, 1915, the attorneys who had appeared for the defendants in this cause until said date withdrew their appearance, and immediately thereafter Lenn J. Oare and Russell W. Geyer entered their appearance in said cause for the said defendants; that on the day the said Oare and Geyer entered their appearance, to-wit: on the 13th day of April, 1915, the attorneys for the plaintiff obtained a rule to answer against these defendants, and then and there the court ordered the rule to be satisfied on the second day thereafter, to-wit: on the 15th day of April, 1915; that the said Lenn J. Oare on the said 15th day of April, began a trial of a cause in the said court, which said trial continued for several days thereafter; that it was the said Lenn J. Oare who was in court at the time said rule to answer was taken and upon whom notice of said order was then and there given; that he, the said Lenn J. Oare, was busy and his time was wholly occupied on the 13th, 14th, and 15th of said month and it was wholly impossible for him to satisfy said rule; that on the 15th of said month, the day said rule was ordered to be satisfied, the said Lenn J. Oare had a conversation with one of the attorneys for the plaintiff and explained to said attorney for the plaintiff

that it would be impossible for him to satisfy said rule on said day, but he would satisfy said rule at the earliest possible time, and that then and there the said attorney for the plaintiff made no objection to the explanation and proposal of the said Lenn J. Oare as defendants' attorney; but stated that 'We will wait and see how your case progresses'; that the said Lenn J. Oare further stated to said counsel for the plaintiff that he would not delay or cause the delay of the said action by failure to plead; that the said Lenn J. Oare had reasons to believe and did believe that it would be satisfactory to the said plaintiff to discharge the rule after the trial in which the said Lenn J. Oare was then engaged was concluded; that at said time of the said conversation with the said counsel for the plaintiff the said Lenn J. Oare intimated to the said counsel the nature of the pleading which he would file in the said cause; that it has not been customary in this court or any court of record in this county to take judgment by default by reason of a failure to comply with a rule to answer unless the party against whom the rule is made has been repeatedly notified, or has shown a disposition to delay the trial of the cause by reason of a failure to plead; that notwithstanding said conversation had with the said Lenn J. Oare, and notwithstanding the custom in this court and any other courts of record of this community, the said counsel for the plaintiff on the 16th day of April, moved this court for judgment by default without notifying the defendants or their attorneys of such action; that said judgment was rendered as by default.

"These defendants would further show the court that they have a valid and meritorious defense to the

action set forth in plaintiff's complaint, in this: that the defendants have no interest in the property upon which the mortgage was sought to be foreclosed in said complaint; that the mortgage was given to the plaintiff by one Cyrus Walters who at the time of the execution of the said mortgage was the owner of said property; that the said property was transferred to the defendant, Mary E. Daub, and that said transfer to the said Mary E. Daub, was a part of a fraudulent transaction and that the said property in law and in equity never was the property of these defendants, and that these defendants in law and in equity never had any interest in the property set forth in plaintiffs' complaint; that the defendant, Mary E. Daub, has heretofore brought her action in the St. Joseph Circuit Court to have the said alleged fraudulent transaction set aside, and that before the beginning of the said action to set aside the said fraudulent transaction, the said Mary E. Daub offered and tendered to the said Cyrus Walters a deed quit-claiming all her interest in the said property to the said Cyrus Walters, and then and there demanded of him, the said Cyrus Walters, that he return unto the said Mary E. Daub the consideration given by her in the said alleged fraudulent transaction. That it is necessary that the defendants herein make a defense in this action in order to prevent a personal judgment against them, and also in order to properly present the matters with reference to said fraudulent transaction to this court, in order that the right accruing to the said Mary E. Daub, in the action now pending as aforesaid in the St. Joseph Circuit Court might not be barred."

The record does not disclose that any other affidavit

was filed, or other evidence heard. The court overruled appellants' said motion, to which action of the court they duly excepted. This action of the court constitutes the sole error relied on for reversal.

Appellants, by their said motion, sought relief from the judgment taken against them by default, under §405 Burns 1914, §396 R. S. 1881, which reads

1. in part as follows: "The court * * *

shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise or excusable neglect, and supply an omission in any proceedings, on complaint or motion filed within two years." Such motion, having been filed at the same term at which such judgment by default was rendered, was a part of the proceedings in said cause, and the ruling thereon, having been properly assigned as error, calls for our consideration. *Kurtz v. Phillips* (1916), 63 Ind. App. 79, 113 N. E. 1016. We agree with appellants that §405, *supra*, imposes an imperative duty on the courts to grant the relief

2. stated, where the "mistake," inadvertence, surprise or excusable neglect, is made to appear to the satisfaction of the court. *Ziegler v. Funkhouser* (1908), 42 Ind. App. 428, 85 N. E. 984; *Macy v. Lindley* (1913), 54 Ind. App. 157, 99 N. E. 790.

Whether sufficient grounds exist for such relief must be determined from the evidence submitted. In

this case appellants' verified motion appears

3. to have been the only evidence before the court as to the facts. It has been repeatedly held that such affidavit partakes of the nature of a deposition and parol testimony, and not of the nature of documentary evidence, and that the rule applicable to parol testimony applies on appeal. *Wells v. Bradley*,

etc., Co. (1891), 3 Ind. App. 278, 29 N. E. 572; *Masten v. Indiana Car, etc., Co.* (1900), 25 Ind. App. 175, 57 N. E. 148; *Peterson v. Downey* (1912), 53 Ind. App. 373, 101 N. E. 737; *Kruse v. State, ex rel.* (1913), 55 Ind. App. 203, 103 N. E. 663. The decision

4. of the trial court, therefore, under the well-established rule, will not be disturbed on appeal, where there is evidence to sustain it. *Costello v. Wallace* (1915), 184 Ind. 734, 110 N. E. 660; *Beavers v. Bess* (1914), 58 Ind. App. 287, 108 N. E. 266; *Vandalia R. Co. v. House* (1914), 59 Ind. App. 10, 108 N. E. 872; *Dorrell v. Herr* (1915), 184 Ind. 445, 111 N. E. 614; *Nicholson v. Smith* (1915), 60 Ind. App. 385, 110 N. E. 1007.

Appellants' verified affidavit discloses that on April 13, 1915, the attorneys for appellee obtained a rule to answer against appellants, and that the

5. court ordered that the rule be discharged on April 15, 1915; that appellants attempted to avoid a compliance with such order by an agreement made out of court with one of appellee's attorneys, but, notwithstanding such alleged agreement, judgment was rendered against them as by default on April 16, 1915. It is to be observed that the alleged agreement was not made in a cause where the making of the issues was passing by common consent of the court and parties, but in a case where an absolute order had been entered for the discharge of a rule. Such an agreement, if definite and positive, could not have the effect to supersede the court's order, nor would it necessarily stand as a sufficient excuse for a failure to comply with the same. It would have furnished grounds on which appellants might have based a request for an extension of time in which to

discharge such rule, but no such request was made. Courts have the power to make such orders, and the dispatch of business often requires, that they be made; otherwise intolerable delays would often result. They are designed to expedite the transaction of business, and should not be treated lightly or suffered to be ignored. *Houser v. Laughlin* (1913), 55 Ind. App. 563, 104 N. E. 309. Section 410 Burns 1914, §401 R. S. 1881, prescribes the duty of the court on a failure to comply with such an order, as follows: "If, from any cause, either party shall fail to plead or make up the issues within the time prescribed, the court shall forthwith enter judgment as upon a default, unless, for good cause shown, further time be given for pleading, on the payment of the costs occasioned by the delay." In view of all the facts, the trial court evidently concluded that no sufficient mistake, surprise, inadvertence or excusable neglect was shown, to authorize the relief sought, and as there was some evidence to sustain such conclusion, this court, under the well-established rule, cannot disturb it.

There is a further reason for sustaining the action of the trial court in overruling appellants' motion to set aside the default and vacate the judgment.

6. Such reason is based on the absence of a sufficient showing on the part of appellants that they had a valid defense to the action. Such a showing is essential under §405, *supra*. *Ziegler v. Funkhouser*, *supra*; *Rooker v. Bruce* (1908), 171 Ind. 86, 85 N. E. 351; *Macy v. Lindley*, *supra*. By reference to appellants' verified motion it will be observed that the defense relied upon is based on the alleged fact that the real estate in question was conveyed to

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appellant Mary E. Daub by appellee's mortgagor, as part of a fraudulent transaction, and that said real estate in law and in equity never belonged to appellants. There is no showing as to the nature of the fraud, nor as to the parties thereto. For anything shown by the record the appellant Mary E. Daub may have been a party to such fraud, and received the conveyance with full knowledge of all the facts. In such event the court will not afford relief, but will leave the parties where they have placed themselves. For the reasons stated, the allegations of appellants' motion are insufficient to show a valid defense to appellee's cause of action, and such motion was therefore properly overruled.

Judgment affirmed.

NOTE.—Reported in 118 N. E. 140.

WAINWRIGHT TRUST COMPANY v. DULIN, RECEIVER.

[No. 9,935. Filed April 24, 1918.]

BANKS AND BANKING.—Insolvent Trust Company.—Claims.—Priority.—Guardianship Funds.—Upon the insolvency of a trust company organized under §4942 Burns 1914, Acts 1893 p. 344, money received by it in its capacity as guardian is not entitled to preference over claims of general creditors, where it appears that all money received by it, including that received as guardian, was commingled and placed in a common fund, so that no amount received by the trust company as guardian could be traced, except that it became a part of such common fund.

From Hamilton Circuit Court; *Ernest E. Cloe*, Judge.

Proceedings in the matter of the receivership of the Hamilton Trust Company. A claim by the Wain-

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wright Trust Company, as guardian of Matilda Roul, filed with the receiver, John S. Dulin, was allowed as a general claim and disallowed as a preferred claim, and claimant appeals. *Affirmed.*

Gentry & Campbell, for appellant.

Shirts & Fertig, for appellee.

HOTTEL, J.—The undisputed facts disclosed by the record necessary to an understanding of the question presented by this appeal are in substance as follows:

In October, 1910, the Hamilton Circuit Court appointed the Hamilton Trust Company, of Noblesville, Indiana, guardian of Matilda Roul, a person of unsound mind. Said trust company qualified as such guardian and acted as such until in January, 1915, when it was closed as insolvent. It was never required to give and never gave any bond for the discharge of its duties as such guardian. John L. Dulin was appointed and qualified as receiver of said trust company, and as such on March 31, 1915, filed a report and resignation as said guardian for and on behalf of said trust company. In this report he showed that at said time there was due said ward from said trust company, guardian, the sum of \$533.46. Said report was approved by the court and said resignation accepted. The appellant Wainwright Trust Company was then appointed and qualified as guardian of said Roul and thereafter demanded of appellee the payment of said sum shown to be due by said report, viz., \$533.46, and such payment being refused, the appellant filed its claim with appellee for the recovery of said funds. The claim is in two paragraphs, the first of which sets out in detail the facts above indicated, and demands judgment for \$533.46 with interest, and

asks that such judgment be given preference over the general creditors of the Hamilton Trust Company.

The second paragraph contains in addition to the averments of the first paragraph a further averment that the Hamilton Trust Company converted the assets of said ward, and demands judgment for said sum and interest and ten per cent. damages thereon. The said receiver filed with the court his report of said claim with the recommendation that it be disallowed as a preferred claim and allowed as a general claim, whereupon such claim was docketed on the probate records of the court, where there was a trial and finding for appellee in the sum of \$594.28, that said sum should be allowed without preference and should be paid out of the assets in the hands of said receiver pro rata with other general creditors.

There was judgment accordingly. A motion for a new trial filed by appellant was overruled, and this ruling is assigned as error and relied on for reversal. Said motion contains two grounds which respectively challenge the decision of the trial court as not being sustained by sufficient evidence, and as being contrary to law.

In its points and authorities, appellant, in support of the first ground of its motion, "asserts its right to a preference over general creditors upon the fact that the money in question was received by the Hamilton Trust Company in its capacity as guardian under an order of a court of record, * * *," citing §4954 Burns 1914, Acts 1893 p. 344, §11.

While there are other propositions differently stated under appellant's points and authorities, the one just indicated involves the question which appellant seeks to have determined by this appeal, viz.:

Under the facts disclosed by the evidence, is appellant's claim entitled to preference over the claims of the general creditors of said Hamilton Trust Company?

It is suggested by appellee that, inasmuch as there was no exception to the order of allowance and no motion to modify the same, there may be doubt whether said question is presented by the record. However, appellee expresses a desire that said question shall be decided, and calls attention to the fact that a former appeal by appellant resulted in a failure to obtain the decision of said question. See *Wainwright Trust Co. v. Dulin, Rec.* (1915), 61 Ind. App. 200, 111 N. E. 808.

We will therefore proceed to a determination of said question without discussing or determining whether it is properly presented by the record. Upon the trial the parties agreed to certain facts. In addition to the facts already indicated, such agreement shows, among other things, the substance of the contents of three separate reports made by said Hamilton Trust Company, guardian, including its final report and resignation before referred to, and in each of said reports said guardian charged itself with an item of interest on account to date received from said trust company. Other facts contained in such agreed statement are as follows:

“The Hamilton Trust Company during practically all its existence, engaged extensively and generally in the business of receiving deposits of money, checks, or drafts, from its patrons, and paying out money upon checks drawn upon it by its patrons against such deposit accounts. * * *
All sums of money received by said Company

from its patrons, including all sums received in its fiduciary capacity as guardian, administrator, executor or receiver, and all sums received as profits or earning of said Company, were commingled by said Company, and were paid out in such a way that any balance remaining due to any particular patron or fiduciary trust could not be identified. The funds received by said Company as guardian for Matilda Rouls cannot be identified or traced to any particular fund, property or security by said Trust Company except that such funds were received by said Trust Company as guardian, and became a part of the general fund of said Trust Company. After the deposit in said general fund of said trust funds on the account of the guardianship of said Matilda Rouls, said Hamilton Trust Company continued to add various deposits made by its various patrons to such general fund, and continued to withdraw money from such general fund in payment of checks drawn by its patrons against deposits made by them with said Company, and continued to withdraw money from such general fund in payment of the obligations of said Trust Company. The total amount of deposits made with said Company and added to such general fund, after the deposit of said trust funds, would greatly exceed the amount in said general fund at any one time. The total amount of the checks drawn against said general fund and paid out of said general fund, after the deposit of said trust funds, would greatly exceed the amount of money in said general fund at any one time. At and prior to the time said Trust Company closed its

doors as insolvent, it was acting as guardian for a large number of minors and other persons incapable of managing their estates, under appointment of said Hamilton Circuit Court, and was also acting as administrator and receiver of other estates under appointment of said Hamilton Circuit Court, and there was then due from said Trust Company, in its fiduciary capacity to said several estates and wards, a large sum of money, viz., about \$9000.00, which had been entered as ledger deposits and commingled in like manner as said Rouls funds; * * *.

“Said Trust Company carried the account of said ward, Matilda Rouls, on the ledger of said Company, in which was kept the commercial deposits of its general patrons, in the name of ‘The Hamilton Trust Company, Guardian, Matilda Rouls.’ All sums of money received by said guardian were credited on said account, and all moneys expended by said Company as such guardian were charged against such account. Said Company, by order of its Board of Directors, allowed and paid to its patrons interest upon time and savings deposits of four per cent. per annum, and also allowed interest at the same rate to the estates and wards who had money in the Hamilton Trust Company; and on October 7, 1914, allowed interest to the estate of its ward Matilda Rouls at that rate to that date. No interest has been accounted for by said Company on said ward’s funds since October 7, 1914; * * *. The liabilities of said Trust Company, other than those on account of funds received by it in a fiduciary capacity were, at the time it was

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closed, approximately two hundred thousand dollars, and its total assets, of every character, including stockholders' liability, of the gross value of approximately one hundred thousand dollars."

It also appears that said trust company, when it was closed by the auditor of state as insolvent, then had on hand in cash the sum of \$300.

It appears from this agreement that all sums of money received by said trust company, including those received in its fiduciary capacity as guardian, administrator, executor, receiver, or from whatever source and in whatever capacity, as well as all its profits and earnings, were commingled and placed in a common fund, so that no amount received by said trust company as the former guardian of appellant's ward could be traced to any particular fund, property or security of said trust company, except that they became a part of its general fund. These facts make the following language of the court in the case of *Fletcher v. Sharpe* (1886), 108 Ind. 276, 9 N. E. 142, pertinent and applicable: "This is a case in which trustees, with others, have become general depositors in a bank which has become insolvent, and whose assets are now in the hands of a receiver for distribution among all its creditors according to law. The question is, do persons who become general depositors of trust funds in such manner as to create the relation of debtor and creditor between themselves and the bank in which the funds are deposited, stand upon a different level from other depositors? * * * When deposits are received, unless they are special deposits, they belong to the bank as a part of its general funds, and the relation of debtor and creditor

arises between the bank and the depositor. This is equally so whether the deposit is of trust moneys, or funds which are impressed with no trust, provided the act of depositing is no misappropriation of the fund. If in receiving a trust fund a bank acted with knowledge that it was taking the fund in violation of the duty of the trustee, the rights of the cestue que trust might be different. In respect to such a case, we decide nothing here.

“In this case, where no impropriety is imputed to the bank in receiving the money, it became the debtor of the petitioners, and its debt to them was of the same character as its debt to any other depositor, and must be paid in the same proportion. The rights of other creditors stand on a level with those of the petitioners, and are to be guarded and protected by the court with the same vigilance.” See cases there cited.

The facts in the instant case are in all material respects substantially the same as the facts in the case just quoted, except that in the instant case the funds were deposited in a trust company created under said special act providing for the organization of trust companies, being §4942 *et seq.* Burns 1914, Acts 1893 p. 344. It follows that the case cited is controlling of the question here presented unless there is some provision in said act which furnishes a ground for a different conclusion.

As before indicated, appellant cites and seems specially to rely on §§4954, 4960 Burns 1914, *supra*; but we are unable to find anything in either of these sections, or in any other section of said act, which gives or evidences an intention on the part of the legislature to give preference to any class of deposit-

ors, fiduciary or otherwise, which deposits funds with companies organized under said act. Indeed, we think the contrary intent is at least inferable when the act is read in its entirety and considered and interpreted in the light of similar acts in other jurisdictions.

The courts of New York under the provisions of an act in many respects similar to ours hold that certain trust deposits are preferred. *Henkel v. Carnegie Trust Co.* (1914), 213 N. Y. 185, 107 N. E. 346; *Madison Trust Co. v. Carnegie Trust Co.* (1915), 215 N. Y. 475, 109 N. E. 580.

The preference recognized in these decisions is expressly based upon and limited to the class of trust funds to which preference is given by the following provisions of said act: Banking Law §190. “* * * No bond or other security, except as hereinafter provided, shall be required from any such corporation for or in respect to any trust, nor when appointed executor, administrator, guardian, trustee, receiver, committee or depositary. * * * *If dissolved by the Legislature or the court, or otherwise, the debts due from the corporation as such executor, administrator, guardian, trustee, committee or depositary shall have the preference.*” (Italics inserted.)

The absence of a provision in our statute like or similar to that above italicized is significant, and in view of its absence the grounds upon which the New York cases are made to rest, as well as the general principles recognized and expressed therein, make them authority for our conclusion in this case. Said act, when read in its entirety, clearly indicates that all general deposits and balances are placed on an equality and constitute a common fund to be used by

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such company in its general business. This is especially true as to said provision requiring such company to pay three per cent. interest on all trust funds not specifically invested.

Under the facts of this case, there being no statute to the contrary, equity would place appellant on an equality with the other creditors of said trust company. *Lippitt v. Thames Loan, etc., Co.* (1914), 88 Conn. 185, 90 Atl. 369. See, also, *Board of Levee Comr's v. Powell* (1915), 109 Miss. 154, 68 South. 71; *Young v. Teutonia Bank, etc., Co.* (1914), 134 La. 879, 64 South. 806; *Potter v. Fidelity, etc., Co.* (1911), 101 Miss. 823, 58 South. 713.

For the reasons indicated, we hold that no error resulted from the action of the trial court in overruling appellant's motion for a new trial, and that therefore the judgment below should be affirmed.

DISSENTING OPINION.

DAUSMAN, J.—I respectfully dissent from the opinion in the above entitled cause.

NOTE.—Reported in 119 N. E. 387.

STAMPFER v. PETER HAND BREWING COMPANY.

[No. 9,415. Filed December 19, 1917. Rehearing denied April 24, 1918.]

1. JUDGMENT.—*Setting Aside.*—*Petition.*—*Sufficiency.*—*Statute.*—A petition to set aside a judgment which in effect is merely a motion to vacate the ruling on the motion for a new trial does not come within §405 Burns 1914, §396 R. S. 1881, providing that a party may be relieved of a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect. p. 492.

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2. **APPEAL.—Right of Appeal.—Final Judgment.**—A petition to set aside a judgment which was in effect merely a motion to vacate the ruling on the motion for a new trial cannot be regarded as an independent proceeding, and the striking of such petition from the files, and the judgment for costs do not constitute a final judgment from which an appeal may be taken under §671 Burns 1914, §632 R. S. 1881, giving the right of appeal from final judgments. p. 492.
3. **APPEAL.—Time for Taking.—Effect of Collateral Proceedings.**—A motion to set aside a ruling denying a motion for new trial was a collateral proceeding and did not extend the time in which to appeal from the original judgment. p. 493.

From Lake Superior Court; *Johannes Kopelke*, Judge.

Action by the Peter Hand Brewing Company against Martin Stampfer. Judgment for plaintiff. From a ruling sustaining a motion to strike out a petition to set aside the judgment, the defendant appeals. *Appeal dismissed.*

Crumpacker & Crumpacker and *Dunn & Lucas*, for appellant.

D. J. Moran, for appellee.

DAUSMAN, J.—Appellee instituted an action against appellant to recover damages for breach of contract. On May 21, 1913, being the twenty-first juridicial day of the April term, a verdict was returned in favor of appellee in the sum of \$800. On May 29, 1913, being the twenty-eighth juridicial day of said April term, appellant filed his motion for a new trial. On November 20, 1913, being the fourth juridicial day of the November term, the court overruled said motion and rendered judgment on the verdict for the amount thereof and costs. On April 28, 1914, being the second juridicial day of the April term, 1914, appellant filed a verified document denominated “Petition to

Set Aside Judgment.” The following is the body of the petition:

“PETITION TO SET ASIDE JUDGMENT.

“The defendant in the above entitled cause respectfully represents to the court that he did, on the 29th day of May, 1913, and within thirty days after the time the verdict in this case was returned and recorded, file in the Clerk’s office of this court his motion for a new trial, this court being not then in session.

“That the number of this case is 9658 and at the November Term of this court, which commenced Monday, November 17, 1913, the docket was called and various causes on the docket set for trial; that the official reporter of this court at said time got out a printed setting of the cases for said term, giving the number and title of each case, on said printed setting; that by the mistake and inadvertence of said reporter, the correct number of this cause was given, and opposite it the title of another case, the same appearing on said printed trial calendar for Thursday, November 20, 1913; that the title of the case printed opposite the number of this cause on said calendar was Stukel vs. Smith, as appears from a printed copy of said trial calendar attached to this motion and made a part hereof; that defendant’s attorney is Fred C. Crumpacker of Hammond, Indiana, and after said causes had been set and before the 20th day of November, 1913, the said Crumpacker procured a copy of said setting and examined the same to ascertain if said cause had been set for hear-

ing and if so, for what date; that because of said inadvertence and mistake of said court reporter, defendant's said attorney did not know that this cause was set for said 20th day of November, 1913; that it is uncertain now whether this cause was set for said time or whether the case of Stukel vs. Smith was then set under the wrong number; that the said Crumpacker was looking after said case for this defendant and defendant relied upon him fully and solely to attend to the said setting of said case and to present and argue said motion for new trial; that because the said Crumpacker was misled by said mistake of said reporter hereinbefore referred to, neither he, the said Crumpacker, nor this defendant were in court at the time said cause printed on said trial calendar as "9658 Stukel vs. Smith" was called for hearing, and neither of them knew or had any idea that said mistake had been made or that this cause would be called up at said time for hearing and disposition or that any steps were to be taken in said cause; that so far as they knew at said time, this cause had not been set, and the said Crumpacker was of the impression that the court would take the same up outside of his regular setting for said term when he took up matters of a similar kind, at such time as could be agreed upon between the parties to this suit, and as was satisfactory to the court.

"That on said date, in the absence of the defendant and his said attorney, and without any knowledge on the part of either of them as to what was being done, the attorney for the plaintiff appeared in court and the court overruled

said motion for a new trial and entered judgment on the verdict.

“That on said date defendant’s attorney left for Indianapolis, Indiana, where on the following morning at 10:00 o’clock in the Supreme Court of Indiana he appeared for the appellee for oral argument in the case of Inland Steel Company vs. Gillespie; that on the morning of said 20th day of November, and before taking his train at noon for the said City of Indianapolis, defendant’s said attorney was busy preparing himself for said argument and had no notice or knowledge or information that it was claimed this cause was set for hearing, and no suspicion that plaintiff’s attorney would be in court insisting upon a disposition of said motion in his absence; that defendant’s said attorney was in his office across the street from the courthouse during said morning and in the same building in which said plaintiff’s attorney had his office and in a place where he might have been reached by telephone by plaintiff’s attorney or the bailiff of this court, if it was the desire of anyone that he be advised under the circumstances that this case was set for hearing and about to be taken up.

“That the judgment entered against defendant herein is for \$800.00 and defendant believes he has a meritorious defense to said action; that he has set out in his motion for new trial various specifications which he then believed and now believes would entitle him to a new trial, if he were given an opportunity to argue the same to this court; that it has been the defendant’s intention ever since the verdict was returned herein to

endeavor to procure a new trial and, if unsuccessful, to appeal said case to the Appellate Court of Indiana, and the defendant has had an arrangement and agreement with his said attorney that said course would be pursued, since prior to the time of filing the said motion for a new trial.

“That neither the defendant nor his said attorney learned that said motion for a new trial had been overruled and said judgment entered in this cause until yesterday, the 30th day of March, 1914; that on the 26th day of March, 1914, defendant’s attorney was notified that a deputy sheriff was seeking to satisfy this judgment by the levy of execution on defendant’s property in the city of Gary; that his said attorney at said time called the sheriff’s office and told them what he understood to be the condition of the record, that is, that this cause was pending on a motion for a new trial and that he, said attorney, would take the matter up with the court and undertake to obtain a stay of proceedings until said motion could be ruled upon; that on the 30th day of March, 1914, the sheriff called defendant’s said attorney and told him that plaintiff’s attorney had advised the said sheriff that the motion for a new trial was overruled and that said plaintiff’s attorney was insisting that the sheriff proceed with the enforcement of said execution; that defendant’s said attorney then examined the record and found it to be in the condition hereinbefore stated; that this application is made not for the purpose of delay, but in order that the defendant may have an opportunity to present his reasons for a new trial and that he may not be

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deprived of the recourse of appeal in the event the court determines that he is not entitled to a new trial; that the ends of justice in all things require that said judgment be set aside and vacated and that this cause be set down for hearing upon defendant's said motion for a new trial.

"And the defendant therefore prays that said judgment be set aside and vacated and that this cause be set for hearing upon said motion for a new trial, and for all other relief necessary and proper in the premises.

"Fred. C. Crumpacker,

"Attorney for said defendant."

The copy of the printed trial calendar filed with the petition shows that ten cases were set for November 20, one of which is designated "9658—Stukel v. Smith."

Notice of the filing of the petition was duly served on appellee. On April 30, 1915, the court sustained appellee's motion to strike said petition from the record, to which ruling appellant excepted. Judgment against appellant for costs. The court granted appellant's prayer for an appeal, designated the amount of the appeal bond and fixed the time within which the bond should be filed. The transcript was filed in the office of the clerk of this court on September 27, 1915.

The first, second and third assignments of error challenge the ruling on the motion to strike out; and the fourth assignment alleges that the court erred in rendering judgment for costs.

The facts averred in appellant's motion (or petition) do not bring the proceeding within the provision

of §405 Burns 1914, §396 R. S. 1881. He was

1. not seeking to set aside a default in order that he might have an opportunity to make his defense on the merits. That defense had been made. In reality he was seeking to reach the judgment only indirectly, remotely and contingently through the motion for a new trial. Directly and immediately he was seeking an opportunity to be heard on the motion for a new trial. While the motion to vacate is somewhat ambiguous, from the general tenor of the averments therein and from appellant's brief we must hold that it is merely a motion to vacate the ruling on the motion for a new trial. Appellant sought to vacate that ruling in the hope that an argument by his counsel would convince the court that a new trial should be granted. The motion to vacate was filed under the title and number of the original action, was treated by the parties and by the trial court as an attempted step in the original action, and the transcript includes the entire proceedings in the original action. Under these circumstances the application to the trial court to set aside its ruling on the motion for a new trial cannot be regarded as an independent proceeding.

We are of the opinion that this appeal cannot be entertained. The action of the court in striking appellant's motion from the files, and the judg-

2. ment for the costs occasioned by said motion do not constitute a final judgment from which an appeal may be taken. §671 Burns 1914, §632 R. S. 1881; Elliott, App. Proc. ch. 5; Ewbank's Manual §82; *Mak-Saw-Ba Club v. Coffin* (1907), 169 Ind. 204, 82 N. E. 461; *Barnes v. Wagener* (1907), 169 Ind. 511, 82 N. E. 1037; *State, ex rel. v. Boyd* (1908), 172 Ind. 196, 87 N. E. 140. The motion to set aside

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the ruling on the motion for a new trial is of

3. the class known as collateral motions and did not extend the time in which to appeal from the original judgment. *Chenoweth v. Chenoweth* (1916), 64 Ind. App. 260, 114 N. E. 988. As an appeal from the original judgment it was not perfected within the time fixed by statute. §672 Burns 1914, Acts 1913 p. 65.

Appeal dismissed.

NOTE.—Reported in 118 N. E. 138.

BICKHART v. HENBY

[No. 9,475. Filed May 9, 1917. Rehearing denied January 11, 1918. Transfer denied April 25, 1918.]

1. CORPORATIONS.—*Conveyances.—Form and Sufficiency.—Signing.*—A warranty deed naming a corporation as grantor and reciting that the corporation, “by its president,” naming him, “has hereunto set its hand and seal” and signed by “O. S. C., President,” is the deed of the corporation, and, though it would have been technically correct to have signed the name of the corporation “by” the proper officer, this was not necessary to make the conveyance effective. p. 496.
2. CORPORATIONS.—*Conveyances.—Authority of President.*—The president of a corporation merely by virtue of his office is not authorized or does not have the power to execute a deed on behalf of the corporation. p. 496.
3. CORPORATIONS.—*Conveyances.—Authority of President.—Presumptions.*—Where a deed naming a corporation as grantor was signed by its president, who affixed the corporate seal, and there was nothing to indicate that the president had proceeded without authority, it will be presumed that he had authority to execute the deed, in view of §4046 Burns 1914, §3002 R. S. 1881, providing that corporations may elect all necessary officers and define their duties, and since there is no statute making it the specific duty of any certain officer to execute conveyances in behalf of a corporation. p. 496.

From Rush Circuit Court; *Clarence E. Weir*, Special Judge.

Action by Charles S. Henry against Christopher J. Bickhart. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

Clarence W. Nichols, Frank J. Hall and George W. Campbell, for appellant.

John H. Kiplinger and Donald L. Smith, for appellee.

CALDWELL, J.—This action in ejectment was brought by appellee against appellant to recover the possession of certain described real estate situate in the city of Rushville, and damages for its detention. The complaint is in the usual short form. The answer is a general denial. A trial before a special judge resulted in a general finding and judgment in favor of appellee, that he is the owner and that he have possession of the land. Damages were awarded him in the sum of \$195.

From a consideration of all the briefs, we are able to determine that the crucial point in the case is the question of the validity and effectiveness of a certain deed, which on first view appears to have been executed by the Rushville Milling Company, purporting to convey the lands involved to James W. White. To understand the relation of such deed to appellee's chain of title, a statement of the facts, as shown by the evidence, is essential. It was stipulated in the record that on June 22, 1903, Clark was the owner in fee of the lands involved. Documentary evidence to the following effect was introduced: A warranty deed, dated June 22, 1909, executed by Clark and wife to the Rushville Milling Company; a warranty deed,

dated May 31, 1910, executed by the Rushville Milling Company to James W. White, being the deed respecting which there is controversy; a warranty deed dated November 19, 1910, executed by James W. White, unmarried, to appellant. Each of said deeds described as lands conveyed the real estate involved here. There was introduced in evidence, also, two mortgages executed by appellant and wife, each of which described as mortgaged the lands in controversy here: first, a mortgage to James W. White, dated November 19, 1910, and securing the payment of \$2,500; second, a mortgage to Owen L. Carr, dated November 29, 1910, purporting to indemnify the mortgagee as security in a sum not exceeding \$3,000. There was introduced, also, a decree of foreclosure entered by the Rush Circuit Court in a proceeding brought by the Rushville National Bank against appellant and other proper defendants to foreclose both the foregoing mortgages. The decree declared the foreclosure of the mortgages, and directed the sale of the lands and the proper distribution of the proceeds. Other documentary evidence was introduced, disclosing the sale of the real estate on said decree, its purchase by Carr, the issuing to him of a certificate of sale, dated November 4, 1912, its assignment to appellee on August 9, 1913, and the execution of a sheriff's deed to appellee on November 4, 1913. There was introduced in evidence, also, a deed executed by appellant and wife to James W. White, dated August 9, 1911, and also a deed executed by White and wife to appellee, dated August 9, 1913. Each of the two deeds last mentioned described as conveyed the lands involved in this action, except a small tract out of the northwest corner thereof.

Assuming for the present that the evidence disclosed title in appellee, there was other evidence that he was entitled to possession of the lands described in the complaint, and that appellant was unlawfully detaining such possession from him. The evidence was sufficient to show title in appellee, aside from the two deeds last mentioned, if the said deed apparently executed by the Rushville Milling Company was valid and effective. This proposition appellant does not controvert, but contends, however, that such deed was ineffective to convey title to the grantee named therein. Said deed reads as follows:

“This indenture witnesseth, That the Rushville Milling Company of Rush County, in the State of Indiana, convey and warrant to James W. White, of Marion County, in the State of Indiana, for and in consideration of four hundred (\$400.00) dollars, the receipt of which is hereby acknowledged, the following described real estate in Rush County, in the State of Indiana, to-wit: Commencing at the southeast corner of lot number five (5) in the original plat of the town, now city of Rushville, Indiana; thence west on the south line of said lot eighty and one-half ($80\frac{1}{2}$) feet; thence south eight (8) rods to the center of Flatrock River; thence east three hundred eleven and one-half ($311\frac{1}{2}$) feet parallel with the south line of lots three (3) and four (4) in the original plat of Rushville; thence north eight (8) rods to the northeast corner of lot three (3); thence west to the beginning, except that part of real estate situated west of Morgan street, the dimensions being eighty and one-half ($80\frac{1}{2}$) feet east and

west and eight (8) rods north and south. Reserving the right for the water to flow undisturbed in said mill race and through the grounds hereby conveyed so long as the Rushville Milling Company or its successor or assigns shall continue to use said water power in any way.

“In witness whereof, the said Rushville Milling Company, by its president, Owen L. Carr, has hereunto set its hand and seal this 31st day of May, 1910.

“(Seal) Owen L. Carr, President.”

The deed contains a proper certificate of acknowledgment.

If said deed was effective to convey to the grantee named therein the Rushville Milling Company's title to the lands described, then appellee's title is not questioned. It is appellant's position, however, that such deed did not convey title. As we interpret appellant's contention, it is to the effect: first, that the deed discloses on its face that it is in form Carr's individual deed rather than the deed of the milling company, and hence that title remains in the latter; second, assuming that the deed evidences an intention to convey the milling company's title, that it is not sufficient to accomplish such purpose, since it was executed only by Carr as president, and that the president of a corporation by virtue of his office is not clothed with power to convey the real estate of the corporate body of which he is an executive officer, and that there is nothing to indicate that in the special transaction such power had been conferred on him.

It will be observed that the deed recites that it is the Rushville Milling Company that conveys and war-

rants, and that it reserves a certain right of flowage, and that it is the milling company that sets its hand and also its seal by its president. In addition, Carr in the act of signing the instrument and in acknowledging it characterizes himself as president of the milling company.

It is contended that if the deed under consideration were intended to be the deed of the corporation, the signature should have been in the form: "Rushville Milling Company, By ———," inserting the name and title of the proper and authorized officer who affixed the signature of the corporation. While such form of signature is both logically and technically correct, it is not exclusively so.

In *City of Fond du Lac v. Estate of Otto* (1902), 113 Wis. 39, 88 N. W. 917, 90 Am. St. 830, where a like contention was made, the court said: "This contention cannot be sustained. While the method suggested would doubtless have been a technically correct method of execution of a corporate obligation, it is now well settled that, where it appears in the body of the instrument that the corporation is the grantor or obligor, then the instrument is well executed by the corporation if signed simply with the signature of the proper officer or officers, with his or their official title or titles." See, also, *Armstrong, Admr., v. Kirkpatrick* (1881), 79 Ind. 527, and cases; *Coaling Coal, etc., Co. v. Howard* (1908), 21 L. R. A. (N. S.) 1051, note 1061; *Hutchins v. Byrnes* (1857), 9 Gray (Mass.) 367; *Nolen v. Henry* (1914), 190 Ala. 540, 67 South. 500; *Sherman v. Fitch* (1867), 98 Mass. 59; *Ismon v. Loder* (1904), 135 Mich. 345, 97 N. W. 769; 2 Cook, Stockholders (3d ed.) §722, note 1.

We conclude that the deed in form is the deed of the

corporation. As we have said, the deed in its body purports to be the deed of the corporation, and its attesting clause recites that it is signed by the corporation, and that its seal is affixed. We regard these circumstances as controlling in the absence of any contrary indication.

We are required to consider next the question of the authority of the president to execute the deed in behalf of the corporation. It may be conceded

2. that the president of a corporation by virtue of his office merely is not authorized or does not have the power to execute a deed in its

3. behalf conveying its real estate. However, a corporation can act only through the agency of some officer or other authorized person. There is no statute in this state providing that it shall be the specific duty of any certain officer of such a corporation as the Rushville Milling Company to execute deeds in its behalf. There is a general statute that such a corporation may elect all necessary officers and define their duties. §4046 Burns 1914, §3002 R. S. 1881. Under such statute, the Rushville Milling Company was authorized to make it the general duty of its president to execute deeds in its name under the direction of its governing body. Moreover, there is no reason why the president here may not have been specially authorized to execute the deed under consideration. He did execute it so that in form it appears to have been done in behalf of the corporation, and he affixed also the corporate seal. The record discloses nothing to indicate that he proceeded without authority. Possession followed the conveyance. That deed forms a link in appellant's chain of title, as title formerly rested in him. Pursuant to

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that deed and others following it, he entered into possession of the lands involved. He executed mortgages on the lands, a deed executed on the foreclosure of which forms a link in appellee's chain of title. There is nothing to indicate that the milling company is questioning the authority of its president as apparently exercised in the executing of the deed involved here. Aside from all questions of estoppel which possibly may also be invoked under the circumstances here, the authority of the president to execute the deed should be presumed. See the following: *Ellison v. Branstrator* (1899), 153 Ind. 146, 54 N. E. 433, and cases; *Hawkins, Rec., v. Fourth Nat. Bank, etc.* (1897), 150 Ind. 117, 125, 49 N. E. 957; *National State Bank, etc. v. Vigo Co. Nat. Bank* (1895), 141 Ind. 352, 40 N. E. 799, 50 Am. St. 330; *Indiana, etc., Asphalt Co. v. Robinson* (1901), 29 Ind. App. 59, 63 N. E. 797; *Flint v. Clinton Company* (1841), 12 N. H. 430; *Gorder v. Plattsmouth Canning Co.* (1893), 36 Neb. 548, 54 N. W. 830; *Angell and Ames, Corp.* (11th ed.) §224; 10 Cyc 1003, and cases; *Morse v. Beale* (1886), 68 Iowa 463, 27 N. W. 461; 2 *Thompson, Corp.* (2d ed.) §1462.

Judgment affirmed.

NOTE.—Reported in 116 N. E. 15. Corporations: implied powers of the president of a corporation, 81 Am. Dec. 137; power of the president of a corporation to sell or mortgage corporate property, see 19 Ann. Cas. 623. As to presumption that contract executed by president of corporation is authorized by corporation, see Ann. Cas. 1917A 380. See under (1) 10 Cyc 1013; (3) 10 Cyc 1003.

McMAHAN v. TERKHORN ET AL.

[No. 9,298. Filed May 29, 1917. Rehearing denied October 23, 1917.

Transfer denied April 25, 1918.]

1. **APPEAL.—Review.—Harmless Error.—Overruling Motion to Make Complaint More Specific.**—Error, if any, in overruling a motion to make the complaint more definite and certain was harmless, where the facts alleged were sufficiently specific to inform defendant of its theory and claim, and the pleading showed that the facts desired were as fully known to him as to plaintiffs, and it appears from the record that defendant was permitted to testify fully concerning the matter which he asked to have more definitely averred. p. 504.
2. **VENDOR AND PURCHASER.—Sales of Real Estate.—Excess Acreage.—Recovery For.**—There can be no recovery for excess acreage where land is sold in gross for a lump sum, except upon the ground of fraud or inequitable conduct. p. 507.
3. **VENDOR AND PURCHASER.—Sales of Real Estate.—Excess Acreage.—Recovery For.—Mutual Mistake.**—A court of equity will allow compensation for excess acreage conveyed when there has been a mutual mistake in the conveyance and the transaction has been free from fraud where the parties have dealt in the belief that the tract of land conveyed contained a stipulated number of acres. p. 508.
4. **VENDOR AND PURCHASER.—Sales of Real Estate.—Excess Acreage.—Recovery For.**—Although a sale of land was technically in gross, where the price was fixed on the basis of an incorrect estimate of the acreage made by a surveyor, which all the parties thought was correct and the price was reduced from that previously agreed upon when the parties correctly believed that the acreage was much greater than shown by the surveyor's estimate, equity will grant the vendor relief measured by the excess acres and the value thereof as expressed in the contract of sale on the basis of a sale by the acre, rescission being impossible because of the conveyance of part of the land by the purchaser. p. 509.

From Jackson Circuit Court; *Simpson B. Lowe*, Special Judge.

Action by Frank Terkhorn and others against Ziba McMahan. From a judgment for plaintiffs, the defendant appeals. *Affirmed.*

Branaman & Branaman and *Thomas H. Branaman*,
for appellant.

Montgomery & Montgomery, for appellees.

IBACH, P. J.—This is an equity case brought by appellees to recover the value of an alleged excess of acreage contained in a tract of land sold by them to appellant.

In their first paragraph of complaint they seek a reformation of the contract of sale and a judgment for \$3,000, the alleged value of the excess acreage. By the second paragraph they seek to correct a mutual mistake of all the parties to the contract respecting the number of acres involved in the sale, and to recover the value of such excess acreage.

There was a motion to make the second paragraph of the complaint more definite and certain, and the sufficiency of each paragraph thereof was also assailed for want of facts. It is quite apparent from the facts found that appellees recovered on their second paragraph, therefore the question of the sufficiency of the first paragraph is not of importance.

The second paragraph avers the title to the land involved to be in appellees, giving a description thereof by metes and bounds, and that the parties entered into a written agreement whereby appellees agreed that on March 5, 1913, they would convey the lands to appellant for \$15,000, subject to taxes. The remaining averments are in substance that the agreement was made and entered into as aforesaid upon the belief and with the understanding by all the parties thereto that said tract of land contained approximately and substantially 133 acres, and that the consideration therefor calculated by the acre would be approximately \$112, and said real estate was on said

day and still is worth that sum per acre. In pursuance of said agreement plaintiffs duly signed and acknowledged a warranty deed conveying said land to defendant subject to the mortgages and taxes, and left the same with the First National Bank of Brownstown, Indiana, for delivery upon the payment of the cash consideration according to the terms of the contract on or before March 5, 1913. About March 1, 1913, defendant employed the county surveyor to survey the land and compute the number of acres within the tract purchased, which was done, and it was reported to contain only 104.52 acres. All the parties accepted such report as being true and believed the number of acres to be as calculated by such surveyor, and upon such assumption agreed that the land upon the basis of their original agreement was not reasonably worth \$15,000, but was of the approximate value of \$11,700, and defendant refused to accept said deed or to consummate the purchase according to the agreement. Thereupon the parties, believing that the tract of land did not contain more than 104.52 acres, were induced to and did agree upon \$12,000 as a consideration for the conveyance, and the plaintiffs did, on March 12, 1913, execute to defendant a conveyance of the lands agreeable to the contract except as to the consideration, and defendant being of the same mind as to the acreage accepted the conveyance and paid the purchase price, and, except for their belief that there were but 104.52 acres of land involved in the transfer, the reduction in price and conveyance would not have been made.

Plaintiffs say further that they bought the same tract of land believing it contained substantially 133 acres, and on the — day of December, 1913, they

first learned that the survey made by the county surveyor was not correct and that the computation of the acreage was erroneous, and that the farm did in fact contain substantially 129 acres, and therefore the reduction in the consideration and the execution of the conveyance was made in ignorance of the facts and under a mistake of facts by all the parties thereto, and under the terms of their agreement and according to the intent of the parties plaintiffs would, except for said mutual mistake, have received the consideration first agreed upon, and in equity and good conscience they are still entitled to receive of defendant the further sum of \$3,000 as a fair consideration for the tract so conveyed in excess of 104.52 acres.

Then follows other averments to the effect that before the error was discovered appellant had reconveyed to other innocent purchasers about fifty acres out of the tract, and a rescission was therefore impossible, and as to the residue appellant refused to rescind.

The foregoing facts are sufficiently specific and definite to inform appellant of the theory upon which the complaint was based, and fully informed

1. him of the claim which he would be required to meet. Furthermore, it clearly appears from the pleading that the facts desired by appellant were as fully known to him as to appellees and the record discloses that appellant was permitted to testify fully concerning the identical matter which he claims should have been more definitely averred in the complaint, so that no possible harm could have come to him if for any reason it would have been proper to have granted his motion. It follows therefore that

there was no reversible error in overruling the motion to require the complaint to be made more specific. *Indiana Bicycle Co. v. Willis* (1897), 18 Ind. App. 525, 528, 48 N. E. 646.

At the request of appellant the court stated the facts and conclusions of law thereon which were favorable to appellees. Judgment followed the conclusions of law. The facts found are substantially as follows: Appellees had purchased a tract of land adjoining Brownstown, Indiana, at commissioner's sale. The commissioner's deed conveyed to them 136.37 acres, except two and one-half acres therefrom. On February 5, 1913, appellant obtained a thirty-day option to buy the same tract for \$15,000, or he might assume two certain mortgages thereon and pay the difference in cash, approximating \$7,900. When this option was obtained appellees and appellant understood and believed in good faith that said tract of land contained approximately 133.87 acres and was at the time valuable and of the reasonable and fair value of \$112 to \$115 an acre. Prior to March 1, 1913, defendant had made a conditional sale of about fifty acres of the said farm, and in making the measurements therefor he was informed that the quantity of land was less than the number of acres believed to have been contracted for. Defendant then procured the services of the county surveyor, who reported in making the survey that the tract about which the parties were dealing contained 104.52 acres and no more. Defendant then informed plaintiffs of the result of the survey, and he proposed to them that he would buy the tract believed by all the parties to contain 104.52 acres for \$12,000. Plaintiffs were induced to accept this proposition. If they had known

the true acreage of the same, they would not have accepted such proposition, and at the time defendant made such last proposition the defendant also in good faith believed that the farm contained 104.52 acres and no more, and made his proposition on that basis. According to the original contract, and before the presumed error was reported, a deed had been executed by plaintiffs to defendant, in which the land was described by metes and bounds substantially as in the deed obtained by plaintiffs from the commissioner, the number of acres contained in the tract being given as 135.48 acres, more or less, less the two and one-half acres referred to before. After the presumed mistake was reported and the sale made on the basis of 104.52 acres, there was added to such original deed what was supposed to be the correct description as found and reported by the county surveyor's survey.

The tenth finding made by the court we set out in full, and it is as follows: "That said tract of land conveyed by plaintiffs to defendant, as aforesaid, for the consideration of \$12,000 does in fact contain and did at all the times hereinbefore mentioned contain 130.39 acres and that said sale and conveyance was made in ignorance of that fact, both on the part of plaintiffs and defendant, and that in the making of said sale and conveyance the quantity of land conveyed was material and was of the essence of the contract, and said sale and conveyance for said consideration would not have been made by plaintiffs if they had at the time known the true and correct acreage of said tract, and that at the time of making said sale and conveyance both the plaintiffs and defendant in good faith believed that the tract of land so bargained and conveyed contained only 104.52 acres and no more,

and that said mistake was induced by the survey and calculation of James F. McCurdy as county surveyor and that his said survey and calculation were and are erroneous and incorrect and said mistake was mutual on the part of the parties to said contract, and that defendant was willing and except for said mistake of fact would have bought and taken said lands for a consideration based upon the true acreage thereof and calculated at the rate of \$15,000 for 132.98 acres, or \$112.70 per acre, and except for said mistake plaintiffs would have received \$15,000 for said tract of land instead of \$12,000 and in equity should receive from defendant the further sum of \$2,694.95, no part of which has been paid." The remaining facts found are substantially in accord with the other averments of the complaint.

Appellant's motion for new trial was overruled. This ruling and the correctness of each of the conclusions are presented by the errors assigned. The precise question is whether under the evidence and the findings of fact plaintiffs are entitled to recover the value of the excess acreage actually contained in the farm.

We are not unmindful of the rule, as contended for by appellant, that there can be no recovery in case of sale in gross for a lump sum, except upon the

2. ground of fraud or inequitable conduct. *Tyler v. Anderson* (1886), 106 Ind. 185, 189, 6 N. E. 600; *Wolcott v. Moore* (1910), 46 Ind. App. 427, 429, 92 N. E. 880; *Newman v. Kay* (1905), 57 W. Va. 98, 49 S. E. 926, 68 L. R. A. 908, 914, 4 Ann. Cas. 39, and cases cited.

It is equally well settled, we think, that a court of equity will allow compensation for excess acreage

conveyed when there has been a mutual mistake

3. in such conveyance and the transaction has been free from fraud where all the parties have been dealing on the belief that the tract of land conveyed contained a stipulated number of acres. In short, equity will grant relief where there is a mutual mistake.

The same principle has been announced in this state in this language: "In case one purchases real estate at a given price per acre and the purchaser and the seller have a common belief that there is of said real estate a given number of acres, and the purchaser pays the purchase price therefor in full and it is ascertained afterwards that there was a gross shortage in the acreage of said real estate that was in nowise contemplated by the seller and the purchaser, the purchaser may recover at the contract price per acre for the gross shortage in acreage." *Wolcott v. Frick* (1907), 40 Ind. App. 236, 81 N. E. 731, and authorities cited.

In the case of *Harrison v. Talbot* (1834), 2 Dana (Ky.) 258, the Court of Appeals, after reviewing many cases, said: "Sales in gross may be subdivided into various subordinate classifications: 1st, Sales strictly and essentially by the tract, without reference, in the negotiation or in the consideration, to any estimated or designated quantity of acres. 2d, Sales of the like kind, in which, though a supposed quantity by estimation is mentioned or referred to in the contract, the reference was made only for the purpose of description, and under such circumstances, or in such a manner as to show that the parties intended to risk the contingency of quantity, *whatever it might be, or how much soever it might exceed, or fall short*

of, that which was mentioned in the contract. 3d, Sales in which it is evident, from extraneous circumstances of locality, value, price, time, and the conduct and conversations of the parties, that they did not contemplate, or intend to risk more than the usual rates of excess or deficit in similar cases, or than such as might be reasonably calculated on as within the range of ordinary contingency. 4th, Sales which, though technically deemed and denominated sales in gross, are, *in fact*, sales by the acre, and so understood by the parties."

The court finds in the case that a sale belonging to either the first or second class could only be disturbed for fraud, but in sales of either of the third or the fourth class an unreasonable surplus or deficit may entitle the injured party to equitable relief unless by his conduct he has waived or forfeited his equity.

We are of the opinion that the present case rather falls more clearly within the fourth class.

There is evidence tending to support the finding of facts in all their essentials. It is true there is no direct testimony as to the value per acre fixed

4. by the option agreement, but it is a reasonable inference from all the evidence that the first agreement made the number of acres of the essence of the contract. This construction was placed on the contract by the parties themselves, one by refusing to accept when it was reported that a smaller number of acres was contained in the tract, and the other by acquiescing in such refusal. In any event the price per acre was a mere matter of calculation and required no further proof than was given.

It certainly would seem inequitable to say that plaintiffs could not recover the value of the differ-

ence in the number of acres when by the original option agreement they were to receive \$15,000 for 132.98 acres, and would have received the same but for the report of the county surveyor that the tract contained only 104.52 acres, and where both parties, acting in good faith, believed the number of acres reported by such surveyor to be correct, and, acting upon such belief, completed the sale and made the conveyance of the same tract of land for \$12,000, and it later developed that the tract actually contained 130.39 acres, resulting in a benefit to appellant of \$3,000 on account of the mutual mistake of the parties.

Judge Story, in his work on Equity Jurisprudence (13th ed.), §155, says: "A court of equity would be of little value if it could suppress any positive fraud and leave mutual mistakes innocently made to work intolerable mischiefs, contrary to the intention of the parties. It would be to allow an act originating in innocence to operate ultimately as a fraud by enabling the party who receives the benefit of a mistake to resist the claims of justice under the shelter of a rule framed to promote it."

We are satisfied that the estimated number of acres involved in this case was in fact the controlling feature of the agreement between the parties, and that the price fixed, although in gross, was based upon the supposed area and was determined by it, and was in fact a sale by the acre, and was so understood and acted upon by the parties.

Equity will therefore interfere to grant relief measured by the excess acres and the value thereof as expressed by the parties in their contract when the contract, as in this case, cannot be rescinded because of

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the gross error which has been innocently made by both parties.

Judgment affirmed.

NOTE.—Reported in 116 N. E. 327.

BONEWITZ v. KRATZ.

[No. 9,677. Filed April 25, 1918.]

1. ADVERSE POSSESSION.—*Evidence.—Sufficiency.*—In an action to enjoin defendants from entering upon and removing timber from certain real estate claimed by plaintiff, evidence held insufficient to show title in defendants by twenty years' adverse possession. p. 520.
2. TRIAL.—*Special Findings.—Failure to Find.—Effect.*—Where there was evidence tending to support the findings of the court for plaintiff, the failure of defendant to secure a finding of facts necessary to sustain his contentions is a finding against him as to those facts. p. 520.

From Huntington Circuit Court; *Samuel E. Cook*, Judge.

Action by Elizabeth Kratz against Jacob Bonewitz and others. From a judgment for plaintiff, the defendant named appeals. *Affirmed.*

Bowers & Feightner, for appellant.

S. M. Saylor, for appellee.

FELT, J.—Appellee brought this suit against appellant, and two other persons who are not parties to the appeal, to enjoin the defendants from entering upon and removing timber from certain real estate of which she claims to be the owner in fee simple. Appellee obtained a temporary restraining order, which was duly served on the defendants.

Appellant filed an answer to the complaint in four paragraphs, the first of which was a general denial. The second alleges in substance that for more than twenty years prior to the commencement of this suit, appellant, under a claim of right, was in the actual, open, notorious, exclusive, continuous and hostile possession of the real estate described in the complaint. The third paragraph alleges that the plaintiff's cause of action did not accrue within twenty years immediately prior to the commencement of this action. In the fourth paragraph appellant sets up facts to show that the question in this suit had been adjudicated in 1879 by the former owners and privies in interest with appellant and appellee; that said adjudication was against the grantors of appellee, remained in full force and effect and is binding upon appellee. Prayer that title be quieted in appellant and against appellee.

Replies in general denial were filed to the affirmative paragraphs of answer.

A request for a special finding of facts was duly made and granted.

Upon the trial certain questions of fact were submitted to a jury for the information of the court.

The court made a finding of facts as follows:

"1st. That in an action pending in the Huntington Circuit Court wherein Henry Bonewitz was the plaintiff and John Wygant and Charles Wygant were the defendants involving the title to the real estate described in the plaintiff's complaint, to wit: The island in the Wabash River in Huntington County in the State of Indiana, at a point where the Wabash River crosses the southeast corner of section 33 and the southwest corner of section 34 in township 28

north, range 10 east. Final judgment was duly given, made and rendered in said cause on the 22nd day of January, 1879, in and by which it was decreed and adjudged by said Court that Henry Bonewitz should take nothing by his suit as to the real estate described in plaintiff's complaint herein, and in which it was also decreed and adjudged that the title of the said John Wygant and Charles Wygant in and to the said real estate should be forever quieted as against the said Henry Bonewitz and any person claiming title under him. That afterwards the said Henry Bonewitz appealed the said case to the Supreme Court of Indiana and such proceedings were had therein that afterwards on the 16th day of September, 1881, said Supreme Court in all things affirmed said judgment of said Circuit Court; that said judgments have never been set aside or modified in any manner and that since said date both of said judgments have been and are still in full force and effect in law. 2nd. That by virtue of conveyance from the said John A. and Charles Wygant and other intermediate conveyances George W. Kratz, the husband of the plaintiff, became the owner of the real estate described in finding No. 1 on the third day of April, 1889, and on the 9th day of June, 1900, he died the owner thereof; that in 1910 in a partition suit in the Huntington Circuit Court between the heirs of said George W. Kratz, the plaintiff, Elizabeth Kratz, became the owner of the said real estate by deed from Samuel M. Sayler, commissioner in said cause. 3rd. That the defendant Jacob Bonewitz in this cause is a son of the said Henry Bonewitz named in finding No. 1 and claims as grantee herein from his said father. 4th. That the plaintiff, Elizabeth Kratz, at and before the com-

mencement of this action was and still is the owner in fee simple of the island described in finding No. 1 herein and that said island extends to the thread of the Wabash River surrounding the same. 5th. That prior to the commencement of this action the defendants, Jacob Bonewitz, Abraham May and Edward E. Youse, unlawfully entered upon said island and cut down the oak tree described in the complaint and were threatening to cut down other trees on said island and would have done so unless restrained by the Court; that said trees which the defendants were threatening to cut are located along the outer edge and banks of said island near to the water of the said river surrounding the island and the said trees and roots thereof are necessary to protect said island from being washed away by reason of floods and if the said trees and brush are removed the water and floods of the said river will wash away the dirt of said island and greatly damage and irreparably injure the same. 6th. That said island has been damaged in the sum of ten (\$10.00) dollars by the cutting of the said oak tree as described in the plaintiff's complaint."

On the foregoing finding of facts the court stated its conclusions of law as follows: "1st. That the law is with the plaintiff. 2nd. That the temporary restraining order herein should be made permanent against the defendants and that said defendants and each of them should be perpetually enjoined from cutting any of the trees or timber described in the complaint and the above findings, or committing any waste on said island. 3rd. That the defendant Jacob Bonewitz is not entitled to recover anything on his answers in this action. 4th. That the plaintiff

should also recover ten (\$10.00) dollars damages against the defendants and the costs of this action.

“December 14, 1915. Samuel E. Cook, Judge.”

The judgment follows the conclusions of law.

Appellant filed a motion for a new trial, which was overruled. The only error assigned and relied on for a reversal of the judgment is that the court erred in overruling appellant's motion for a new trial. A new trial was asked on several alleged grounds. The briefs are very uncertain and indefinite as to the grounds relied upon. By a liberal construction we may reasonably infer that the question relied on is the sufficiency of the evidence to support the finding of facts. Stated more specifically, it is whether the undisputed evidence shows that appellant by proof of facts showing adverse possession has established his ownership and right to possession of that part of the island lying between the line of the old fence and the thread of the stream surrounding the island.

The complaint in the suit brought by Henry W. Bonewitz in 1879 was offered in evidence. In it the plaintiff alleged that he was the owner in fee simple and entitled to the possession of fifteen acres of land forming a part of the south bank of the Wabash river, being the north part of the northwest fractional quarter of section 3, township 27 north, range 10 east, in Huntington county, Indiana.

The verdict of the jury in the case reads as follows: “We, the jury, find for the defendants and we find that John A. Wygant and Charles Wygant are the owners of the said real estate.”

The pleadings and record of proceedings in the former case were in evidence, and among other things it is shown that after the verdict was returned the de-

fendants by Sayler and Milligan, their attorneys, entered a remittitur in substance as follows: It being manifest that the verdict is by mistake too large, that the tract intended to be awarded the defendants is the tract described in their cross-complaint instead of the plaintiff's complaint, therefore the defendants do now enter their remittitur to all of said lands described in the complaint except that certain portion described in defendants' cross-complaint, being the island which is and has been in defendants' possession, containing 8.13 acres.

The record of the government patent issued to John A. Wygant and Charles Wygant, on October 28, 1876, was in evidence, wherein the real estate was described as the island in Wabash river situated in section 3, in township 27, and in section 34, township 28 north of range 10 east in the district of lands subject to sale at Indianapolis, Indiana, containing 8.30 acres.

Both appellant and appellee hold the record title to certain lands. Appellant's land is described as the northwest fractional quarter of section 3 aforesaid, and appellee's as the island in the Wabash river in Huntington county, Indiana, at a point where the Wabash river crosses the southeast corner of section 33, and the southwest corner of section 34, in township 28 north, range 10 east.

Appellant concedes that appellee's predecessors settled and adjudicated their title to certain portions of said island in the former suit, but contends that they, and appellee, were and are limited to 8.13 acres, which was inclosed by a fence, and that it did not include certain portions outside such fence and next to the stream.

There is evidence tending to show that a survey by latitudes and departures indicated that the island contains 9.95 acres, and that a survey by triangulation indicated that it contains 8.37 acres; also that the cleared portion contains 7.77 acres.

The evidence also tends to show that a stream of water flows around the island, on all sides thereof, the general direction of which is from east to west; that the main channel is north of the island; that a fringe of shrubs and timber, varying in width from a few feet to several rods, is on the outer edge of the island between the water and the cleared land which was formerly inclosed by a fence; that the soil is of a sandy nature and inclined to wash, and on a portion of the north side of the island high water has washed it away and removed a part of the fringe of shrubs and timber that formerly grew near the water's edge; that the fringe and timber and shrubs was left to prevent high water washing away the soil; that at places the banks of the stream are high and well defined, and at other places the ground slopes gradually from the higher level of the island to the level of the water in the stream, but the banks are discernible at all places; that the tree that was cut and which gave rise to this suit stood on sloping ground between the old fence line and the edge of the stream at low-water mark, on the eastern part of the island.

Appellant and appellee and their predecessors in title respectively paid taxes on their respective lands described as above indicated.

John Wygant testified in substance that he and his brother bought the island in 1871; that they did not claim the land along the stream next to the land of

Bonewitz, but did claim the land around the edge of the island and between the fence and the north channel of the stream; that there were two channels south of the island; that appellant and his father sometimes claimed the same strip, even after the former litigation, but that they never had possession of it and never tried to prove it up; that he talked to Henry Bonewitz about it, and said, "Henry, the way I understood that, the Court gave us the boundary between the waters all around," and Henry said the court did not. The witness also testified that Bonewitz "never cut a tree off of the island while we owned it"; that he and his brother claimed possession of the strip around the cleared land and always went in on the island.

Charles Wygant testified that Bonewitz never claimed possession of the land outside the fence after the former litigation; that three or four years thereafter, while Sam Stetzel owned the island he, the witness, cut and hauled away a tree that stood within about two rods of the tree mentioned in the complaint.

William Holmes testified that he worked for appellee eight or nine years before this trial, and at her direction hauled timber from the south side of the island between the fence line and the stream; that he also cut timber from the same portion of the island; that most of his work was on the south side of the island next to Bonewitz, who saw him at work frequently; that he worked all fall and late in the winter, and Bonewitz never objected except once, and that was when he was finishing up his work, but he went ahead and finished anyhow.

Appellee testified that appellant, after the death

of her husband in 1890, had cut some timber off of the island; that when she saw him she told him not to take away any more timber from the island, for it belonged to her; that all the timber he cut and removed from the island was without her consent, and most of it without her knowledge at the time.

Howard Kratz, a son of appellee, testified that some timber had been cut and removed from the island in the winter of 1903-4 without the knowledge or consent of his mother or any one representing her; that during the time his father owned the island from 1889 to 1900, when he died, no timber was cut or removed from the island; that on one occasion shortly before this suit they heard a tree fall, and he immediately went and found that the tree was on the island, and also found some men cutting a tree on the south side of the bayou, who told him they had cut the tree on the island for Mr. May, and he notified them not to cut any more. He also testified that his mother did not claim the lowland across the stream or in the bayou; that certain bolts mentioned by other witnesses were cut on the lowland across the bayou on the land of Bonewitz which they had never claimed.

There was evidence strongly tending to show that appellant and his father claimed the island up to the fence, and that they had cut and removed timber therefrom, and in other ways asserted their claim of ownership. But the evidence above set out and other of a similar character tends to show that appellee and her predecessors in title had on many occasions disputed appellant's right and claimed title to the thread of the stream surrounding the island.

On this state of the record appellant's contention that the undisputed evidence shows that he has had

the actual, open, exclusive, continuous and un-

1. interrupted possession of the island outside of the line of the old fence since and before the other suit above mentioned cannot be sustained.

There is evidence tending to show that appellee owns the island to the thread of the stream surrounding the same and tending to support all the

2. findings of the court. Such being the situation, the failure of appellant to secure a finding of the facts necessary to sustain his contentions is a finding against him as to those facts.

There is practically no dispute about the law of the case, and the controversy turns upon the sufficiency of the evidence to support the finding of facts. The following decisions are decisive of the law applicable to the several questions in the case: *Horn v. Lupton* (1914), 182 Ind. 355, 362, 105 N. E. 237, 106 N. E. 708; *Elliott v. Pontius* (1894), 136 Ind. 641, 647, 648, 35 N. E. 562, 36 N. E. 421; *Hitt v. Carr* (1916), 62 Ind. App. 80, 93, 104, 114, 109 N. E. 456, and cases cited; *McBeth v. Wetnight* (1914), 57 Ind. App. 47, 52, 106 N. E. 407; *Steeple v. Downing* (1878), 60 Ind. 478, 502; *Henderson v. Griffin* (1831), 5 Pet. (U. S.) 151, 158, 8 L. Ed. 79, 81; 2 C. J. 64, 93, 94, and cases cited.

Judgment affirmed.

NOTE.—Reported 119 N. E. 380. See under (1) 2 C. J. 276; (2) 38 Cyc 1985. Adverse possession, essentials, 28 Am. St. 158; 88 Am. St. 701.

Wright, Rec., v. O'Brien—67 Ind. App. 521.

WRIGHT, RECEIVER, v. O'BRIEN.

[No. 9,544. Filed April 30, 1918.]

1. **ALTERATION OF INSTRUMENTS.—Material Alteration.—Bills and Notes.**—Any alteration transforming a note in its legal effect is material, even though the burden of the complaining party is not thereby enlarged. p. 524.
2. **ALTERATION OF INSTRUMENTS.—Material Alteration.—Time of Payment.—Release of Surety.**—An alteration of a note after its execution which postpones the date of payment is material, and such note is unenforceable against a maker, or a surety, not consenting to the alteration. p. 524.
3. **APPEAL.—Pleading.—Demurrer.—Waiver of Defects.**—The objection that an answer, in an action on a note, is defective because the word "signed," as used in the answer, is not equivalent to the word "executed" is waived where such defect was not specified in the memorandum to the demurrer, as required under §344, cl. 6, Burns 1914, Acts 1911 p. 415. p. 525.
4. **ALTERATION OF INSTRUMENTS.—Defenses.—Estoppel.**—The participation by the maker of a promissory note in an arrangement with the president of the payee bank, whereby the president could borrow money from the bank in violation of law, would not estop the maker from setting up the defense of material alteration, in the absence of a showing in the plea of estoppel of an agreement to the alteration, since there would be no connection between the alleged unlawful act and the alteration of the note. p. 525.
5. **ALTERATION OF INSTRUMENTS.—Spoliation.—Recovery on Note in Altered Form.**—Although an alteration in a note made by an agent of the holder, without any authority, either expressed or implied, is a mere spoliation not affecting the validity of the note as originally written, such rule has no application in an action on a note in its altered form, regardless of the person making the alteration, where the change is material, since the note in its altered form would not be the contract of the defendant maker. p. 526.

From Lake Superior Court; *Walter T. Hardy*,
Judge.

Action by William Wright, receiver of the Indiana

Trust and Savings Company, against James H. O'Brien. From a judgment for the defendant, the plaintiff appeals. *Affirmed.*

L. V. Cravens, for appellant.

Patterson & Crites, for appellee.

BATMAN, P. J.—This is an action by appellant against appellee on a promissory note. The complaint is in a single paragraph, with the note in suit as an exhibit. Appellee filed an answer in two paragraphs, which was duly verified by his oath. The first paragraph is a denial of the execution of the note. The second paragraph admits the signing of the note, but alleges that since he so signed the same, it has been altered in this: that the year date thereof has been erased in part and other and different figures substituted, thereby causing said note to bear a date one year later than the original and true date borne by it when he signed the same; that said alteration was made without his knowledge or consent; and that the note sued upon is not his act and deed. To the second paragraph of said answer appellant filed a demurrer for want of facts, together with a memorandum stating in substance that it does not set forth facts showing a material alteration of such note, but shows on its face that the alleged alteration was not material, and that appellee was not injured or his liability increased thereby. This demurrer was overruled and appellant duly excepted. He then filed a reply to said second paragraph of answer in four paragraphs. The first paragraph of such reply is a general denial. The second paragraph alleges that after the date of the alleged alteration of said note appellee agreed to pay the same; that he thereby

waived any defense that he might have had thereto by reason of such alteration, and is now estopped from denying liability thereon by reason of such alleged change. The third paragraph alleges that the change in the date of said note, if the same was made, was made with the consent of appellee. The fourth paragraph alleges in substance that at the time of the signing of the note sued on one Charles E. Fowler was president of the bank of which appellant is now receiver; that by reason of such fact it was unlawful for him to borrow money therefrom; that, in order to evade the law and procure an indirect loan from said bank, he procured appellee to sign the note in suit as an accommodation note, on a promise that he would pay the interest thereon, until such time as he was able to pay the same and, being president of said bank, would use his influence to prevent appellee from being pressed thereon or required to pay the same; that such arrangement was wholly in violation of law and a fraud on said bank; that, by reason of appellee's delivery of said note to said Fowler for such purpose, he cannot now take advantage of such fraud, and disclaim liability on said note on account of said alleged alteration of the date. Appellee filed a demurrer to each the second, third and fourth paragraphs of said reply, which was overruled as to the second and third paragraphs and sustained as to the fourth. The demurrer was accompanied by a sufficient memorandum to require a consideration of the question, based on the action of the court in sustaining such demurrer to said fourth paragraph of reply. The cause was submitted to the court for trial without the intervention of a jury. At the close of appellee's evidence, appellant moved for judgment in

his favor for the reason that appellee had failed to sustain either paragraph of his answer. This motion was overruled, and at the conclusion of the trial judgment was rendered in favor of appellee. Appellant filed his motion for a new trial, assigning as reasons therefor that the court erred in overruling his motion for judgment, and that the finding and judgment of the court was not sustained by sufficient evidence, and was contrary to the law and the evidence. This motion was overruled, and appellant has appealed, alleging that the court below erred: (1) In overruling his demurrer to the second paragraph of appellee's answer; (2) in sustaining appellee's demurrer to his fourth paragraph of reply; (3) in overruling his motion for a new trial.

Appellant, in support of his first assigned error, insists that the change in the date of the note in suit, as alleged in said second paragraph of answer,

1. is not a material alteration, as it did not increase appellee's liability or otherwise injure him. He cites the case of *Holthouse v. State*,
2. *ex rel.* (1911), 49 Ind. App. 178, 97 N. E. 130, as supporting his contention, and quotes from page 184 of the opinion. In the case of *John Kindler Co. v. First Nat. Bank, etc.* (1915), 61 Ind. App. 79, 109 N. E. 66, this court expressly disapproved such portion of said opinion, and held that, if an alteration of a note is such as to transform the instrument so that it is not the same in legal effect as the instrument executed, the alteration may be material, even though the burden of the complaining party is not thereby enlarged. It is a well-recognized rule that a change in the date of a note, whether it postpones or accelerates the time of payment, is material, and con-

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stitutes an alteration which will vitiate the same. 2 C. J. 1203. In harmony with such rule this court has held that the alteration of a note after its execution so as to postpone the date of payment is a material alteration, and cannot be enforced against a surety, if done without his consent. *Brannum Lumber Co. v. Pickard* (1904), 33 Ind. App. 484, 71 N. E. 676. This is an authority against appellant's contention, as the rule therein stated as to the effect of an alteration of a note is equally applicable to the facts of this case, notwithstanding the fact that appellee was the sole maker of such note instead of a surety thereon.

Appellant also insists, in further support of his first assigned error, that the word "signed," as used

in said second paragraph of answer, is not
3. equivalent to the word "executed," and for that reason such answer is insufficient. As the memorandum filed with the demurrer in compliance with clause 6 of §344 Burns 1914, Acts 1911 p. 415, fails to specify such defect, it is waived in this court. *Hedekin Land, etc., Co. v. Campbell* (1915), 184 Ind. 643, 112 N. E. 97. We conclude that there was no reversible error in overruling the demurrer in question.

Appellant's second assignment of error relates to the action of the court in sustaining a demurrer to his fourth paragraph of reply. This paragraph

4. sets up an alleged arrangement between appellee and the president of the payee of the note in suit, whereby such president could borrow money from such bank by means of such note in violation of law, and attempts to predicate an estoppel on such fact. There is no allegation of any agree-

ment for the extension of such note by an alteration thereof. It is manifest that appellee's participation in such alleged unlawful act would not estop him from setting up a defense to such note wholly unrelated thereto. We are unable to see any connection between the alleged unlawful act in the procurement of such loan and the alleged alteration of such note, and therefore conclude that the court did not err in sustaining a demurrer to said fourth paragraph of reply.

The only remaining assignment of error relates to the action of the court in overruling appellant's motion for a new trial. All reasons assigned

5. therein involve a consideration of the evidence and will be considered together. Appellant contends in effect that there is no evidence that the alteration of the note in this suit was made by or with the knowledge and consent of the bank; that, although its president may have made such alteration, the evidence fails to show that he had any authority from the bank to do so, and hence his act in so doing was the act of a stranger; that a change in a note by a stranger is a mere spoliation, and will not release the maker; and that by reason of such fact there should have been a finding in his favor. It may be conceded, as contended by appellant, that an alteration in a note made by the agent of an obligee or holder, without any authority, either expressed or implied, is a mere spoliation by a stranger to the transaction, which does not affect its validity as originally written. *Kingan & Co. v. Silvers* (1895), 13 Ind. App. 80, 37 N. E. 413; *Brooks v. Allen* (1878), 62 Ind. 401; *Ballard, Admr., v. Franklin Life Ins. Co.* (1881), 81 Ind. 239; *Green v. Beckner* (1891), 3 Ind. App. 39, 29 N. E. 172; *Singer, etc., Co. v. Barger* (1912), 92

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Neb. 539, 138 N. W. 741, Ann. Cas. 1914A 57 and note; *Clyde, etc., Co. v. Whaley* (1916), 231 Fed. 76, 145 C. C. A. 264, L. R. A. 1916F 289, and note. Such rule, however, cannot aid appellant under the facts and circumstances of this case. We have held that the change of a note postponing the date of its payment is a material alteration. There was evidence to authorize a finding that such a change had been made in the note in suit without the consent of appellee, and that this action is brought on the note in its altered form. Such a finding would preclude a recovery by appellant in this action, regardless of who made such alteration or by whose authority it was made. This is true, for the reason that if such change was made by the authority or with the consent of the bank, it invalidated the note, and thereby rendered it nonenforceable. *Hamilton v. Wood* (1880), 70 Ind. 306; *Stayner v. Joice* (1882), 82 Ind. 35; *Palmer v. Poor* (1889), 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; *Fry v. P. Bannon Sewer Pipe Co.* (1912), 179 Ind. 309, 101 N. E. 10; *LaGrange v. Coyle* (1911), 50 Ind. App. 140, 98 N. E. 75. But, if such change was made by the president of said bank or other person, under such circumstances as to make such act a mere spoliation of the note, still it would be nonenforceable in its altered form, as it would not be the contract of appellee. 2 C. J. 1259; *Cochran v. Nebeker* (1874), 48 Ind. 459; *Kingan & Co. v. Silvers, supra*; *Hess v. Schaffner* (1911), (Tex. Civ. App.) 139 S. W. 1024; *Orlando v. Gooding* (1894), 34 Fla. 244, 15 South. 770. It thus appears that in either event appellant would have no right of recovery in this action. We therefore conclude that the court did

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not err in overruling appellant's motion for a new trial. We find no reversible error in the record. Judgment affirmed.

NOTE.—Reported in 119 N. E. 469. Alteration of date of negotiable instrument as material alteration, see Ann. Cas. 1913D 725. See under (1) 2 C. J. 1200; (4, 5) 2 C. J. 1250.

WASHBUSKY v. PEYTON ET AL.

[No. 10,180. Filed April 30, 1918.]

APPEAL.—*Dismissal.*—*Grounds.*—Where the errors assigned on appeal require a consideration of the evidence, and the record shows that the bill of exceptions containing the evidence was not filed within the time allowed for that purpose, and no extension was granted, the evidence is not in the record, and the appeal must be dismissed, since no question is presented for review.

From Clark Circuit Court; *James W. Fortune*, Judge.

Action between Israel Washbusky and David C. Peyton and others. From the judgment rendered, the former appeals. *Appeal dismissed.*

H. Willard Phipps, *Burdette C. Lutz* and *Warren B. Allison*, for appellant.

Ele Stansbury, Attorney-General, and *Stotsenburg & Weathers*, for appellee.

IBACH, C. J.—Appellees have filed a motion to dismiss this appeal on the ground that the record presents no question for our decision. In support of such motion they show that the only errors assigned by appellant are: (1) That the court erred in sustaining appellee's motion for peremptory instruc-

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tions; (2) that the court erred in overruling appellant's motion for a new trial; that a consideration of said questions would depend upon a consideration of the evidence, and the record shows that the motion for a new trial was overruled on May 19, 1917; that sixty days' time was given on that day in which to file the bill of exceptions; that the bill of exceptions containing the evidence was not presented to the court for its approval until November 14, 1917, and was not filed in said court until that date; that appellant was never granted any extension of time in which to file said bill of exceptions.

Upon an examination of the record we find these facts to be true. It follows that no question is presented, and the appeal must be dismissed. *Huntingburg Bank v. Morgenroth* (1916), 64 Ind. App. 315, 115 N. E. 798; *Beard v. Fenton* (1918), *post* 605, 119 N. E. 495.

Appeal dismissed.

NOTE.—Reported in 119 N. E. 477.

HERR v. McCONNELL.

[No. 9,600. Filed May 1, 1918.]

1. BROKERS.—*Sale of Real Estate.—Commission Contracts.—Description of Real Estate.—Sufficiency.—Statute.*—A written contract, "I hereby agree to pay * * * for trading my 615 acres farm at Hopkins Park, Ills." sufficiently described the land to satisfy the requirements of §7463 Burns 1914, Acts 1913 p. 638, providing that contracts for commissions for the sale or exchange of real estate shall not be valid unless in writing and that any general reference to the real estate sufficient to identify the same shall be deemed to be a sufficient description thereof. p. 531.
2. BROKERS.—*Exchange of Real Estate.—Commission Contract.*—
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Right to Compensation.—Under a contract to pay commission, “for trading my 615 acres farm” at a certain place for a garage in another city, the agent was entitled to a commission on the exchange of such farm for the garage mentioned, although he merely furnished the customer and the owner closed the deal, which included the conveyance of additional land and making various arrangements as to incumbrances, without consulting the agent. (*Wellinger v. Crawford* [1911], 48 Ind. App. 173, distinguished.) p. 532.

From Newton Circuit Court; *Charles W. Hanley*, Judge.

Action by John McConnell against John Herr. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

W. H. Parkinson, for appellant.

John A. Dunlap and *Frank Davis*, for appellee.

FELT, J.—This is a suit by appellee, John McConnell, against appellant, John Herr, to recover a commission alleged to be due for services as agent in the exchange of certain real estate. The case was tried by a jury on a second paragraph of complaint, which was answered by a general denial. The jury returned a verdict for appellee in the sum of \$1,537.50. Appellant’s motion for a new trial was overruled, and this appeal taken. The errors assigned are the overruling of appellant’s demurrer to the second paragraph of appellee’s complaint, and the overruling of his motion for a new trial.

The second paragraph of the complaint alleges in substance: That on October 28, 1914, the defendant entered into a written contract with plaintiff, as follows:

“Contract of Trade.

“Chalmers, Indiana. Oct. 28-14.

“I hereby agree to pay to John McConnell

Two Dollars and 50 cents per acre for trading my 615 acres farm at Hopkins Park Ills. for Garage at Hoopeston Ills. when deal is closed.

“Signed: John Herr.”

That defendant agreed to pay the sum of \$2.50 per acre for trading 615 acres of land located near Hopkins Park, Illinois, for a garage at Hoopeston, Illinois; that plaintiff has done and performed all things on his part to be performed by him under said contract, and defendant has received and accepted said garage, but has failed to pay plaintiff the sum of \$1,537.50 for his services aforesaid; that said amount is due and unpaid.

The demurrer was on the ground that said paragraph does not state facts sufficient to constitute a cause of action. The memorandum accompanying the demurrer states that: (1) The property is not specifically described; (2) the real estate is not so described as to authorize parol proof to identify it; (3) that the real estate referred to in the contract is not described in the complaint.

Appellee states that the case was tried on an amended second paragraph of complaint which he sets out in his brief, wherein the real estate is specifically described, but such amended paragraph does not appear in the transcript.

However, the complaint above set out is good as against the objections stated in the memorandum.

Section 7463 Burds 1914, Acts 1901 p. 104,

1. Acts 1913 p. 638, provides that contracts of the kind involved here shall not be valid, “unless the same shall be in writing, signed by the owner of such real estate or his legally appointed and duly qualified representative: Provided, That any general

reference to such real estate sufficient to identify the same shall be deemed to be a sufficient description thereof." The foregoing contract contains such general reference and the complaint alleges that appellant received and accepted the property specified in the contract. The writing signed by appellant is sufficient to satisfy the requirements of the statute. *Doney v. Laughlin* (1911), 50 Ind. App. 38, 44, 45, 94 N. E. 1027, and cases cited; *Morton v. Gaffield* (1912), 51 Ind. App. 28, 32, 98 N. E. 1007; *Mullen v. Bower* (1898), 22 Ind. App. 294, 296, 53 N. E. 790.

Under the motion for a new trial appellant challenges the sufficiency of the evidence to sustain the verdict. The evidence shows that appellant

2. closed the deal with Mr. Prevo, who was the customer furnished by appellee, but that in doing so he conveyed 897 acres, which included the 615 acres mentioned in the contract; that there was incumbrance on the 615 acres amounting to \$30,250, and on the additional 282 acres, amounting to \$7,000. Appellant conveyed the land subject to incumbrance amounting to \$32,000, arranged the balance of the incumbrance that was on the land so as to protect Mr. Prevo, by giving a mortgage on the garage, which was already incumbered by a building and loan mortgage amounting to over \$4,000. Appellant took title to the garage subject to the incumbrance aforesaid, and received some furniture that went with the garage.

Appellee had some knowledge of negotiations between appellant and Mr. Prevo and his agents, and knew that the latter did not accept the original proposition to trade for the 615 acres, but he was not present and had nothing to do with the final negotiations,

by which the agreement was reached on which the deal was closed. On November 3, 1914, he received a telegram from appellant stating, "Kankakee farm sold," which gave him the first information that the property had been sold by Mr. Herr.

There is some controversy in the evidence as to whether any other or different agreement was made about a commission other than that evidenced by the writing aforesaid. But for the purposes of this appeal, after verdict, we must view the proposition as resting upon the original agreement in accordance with appellee's contention, since there is evidence tending to support that view.

The latter proposition distinguishes the case at bar from that of *Wellinger v. Crawford* (1911), 48 Ind. App. 173, 89 N. E. 892, 93 N. E. 1051, relied upon by appellant. In that case the original written contract between the owner and agent stipulated a definite price and the commission to be allowed and paid for a sale at that price. Upon failure to procure a purchaser, the agent reported such fact to the owner, and by a parol agreement they materially modified their original written contract. The suit was based upon the written contract, but the complaint also showed that the property was not sold for the stipulated price of \$5,000, but was sold for \$4,500. In order to show compliance with the contract, the parol agreement was set up, by which it was claimed that the owner waived the condition of the written contract requiring the property to be sold for \$5,000 and agreed to the price of \$4,500. The court held "that such a condition in a contract, required under the statute of frauds to be in writing, cannot be waived or modified by parol."

The suit in this case is based upon the original written agreement. As above shown, appellee and appellant did not modify or change their contract. Appellant obtained the property mentioned in the commission contract, from the customer furnished by appellee.

The fact that appellant conveyed additional land and made different arrangements about the incumbrance on the property in order to consummate the deal did not destroy or affect appellee's right to the commission for disposing of the land covered by his contract. He stood upon his contract and recovered only the amount specified therein.

The commission contract says nothing about the terms or conditions on which the trade was to be made, but stipulates for the payment of the commission for "trading my 615 acres farm, * * * when deal is closed." So long as the commission contract was unchanged, modifications of the terms of the trade by the owners of the property could not affect appellee's right to recover on his contract when the deal for the 615-acre farm was closed.

There is evidence tending to support the verdict. *Shelton v. Lundin* (1909), 45 Ind. App. 172, 176, 90 N. E. 387; *McFarland v. Lillard* (1891), 2 Ind. App. 160, 163, 28 N. E. 229, 50 Am. St. 234; *Storer v. Markley* (1904), 164 Ind. 535, 537, 73 N. E. 1081; *Cox v. Haun* (1891), 127 Ind. 325, 326, 26 N. E. 822; *Doney v. Laughlin*, *supra*; *Rabb v. Johnson* (1901), 28 Ind. App. 665, 667, 63 N. E. 580.

Appellant by his motion for a new trial challenges the correctness of instructions Nos. 6, 7 and 8 tendered by appellee and given by the court.

These instructions in different form convey the

idea that if appellee furnished appellant a customer as required by their written contract, and in pursuance thereof appellant effected an exchange of his property mentioned in such contract, on terms mutually agreed to by the owners of the property, differing to some extent from the terms mentioned in the commission contract, appellant would be liable for the specified commission, unless prior to such sale or transfer of the property appellant and appellee had in some way changed or modified their commission contract. The instructions so given are substantially correct under the issues and evidence of the case, and were not prejudicial to appellant's rights.

Complaint is also made of the refusal of the trial court to give the jury instructions Nos. 1, 2 and 3 tendered by appellant.

Each of these instructions is bottomed on the proposition that appellee cannot recover in this action, though he may have furnished the customer who traded for appellant's property mentioned in the commission contract, if the owners of the property exchanged did not trade on the precise terms suggested in such contract, though such modified terms were mutually and voluntarily agreed to by appellant and the customer so furnished by appellee.

The court did not err in refusing such instructions. The commission contract was not changed or modified in any way. Appellant obtained the benefit of the services performed by appellee, and the modification of the terms on which the trade was consummated did not relieve appellant from his obligation, since he transferred his property to the customer furnished by appellee and obtained the property mentioned in his written agreement.

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The cases which deal with attempted parol modifications of commission or other contracts are not applicable to the facts of this case. *Shelton v. Lundin*; *supra*; *Provident Trust Co. v. Darrough* (1906), 168 Ind. 29, 36, 37, 78 N. E. 1030; *Miller v. Stevens* (1899), 23 Ind. App. 365, 371, 55 N. E. 262; *Wellinger v. Crawford*, *supra*; *Lowe v. Turpie* (1896), 147 Ind. 652, 681, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233; *Carpenter v. Galloway* (1881), 73 Ind. 418, 423.

The cases already cited show that there was no error in the exclusion of evidence.

The case seems to have been fairly tried on the theory presented by the complaint and a correct result reached. No intervening error prejudicial to appellant has been shown. Judgment affirmed.

NOTE.—Reported in 119 N. E. 496. See under (1) 9 C. J. 558.

STATE OF INDIANA, EX REL. O'BRIEN, AUDITOR OF STATE,
v. CONTINENTAL INSURANCE COMPANY
OF NEW YORK.

[No. 9,580. Filed June 29, 1917. Rehearing denied December 7, 1917. Transfer denied May 2, 1918.]

1. TAXATION.—*Receipts of Foreign Insurance Companies.—Statute.—Construction.*—Under §10216 Burns 1914, Act 1891 p. 190, §67, requiring insurance companies not organized under the laws of Indiana and doing business therein to report for taxation semi-annually the gross amount of all receipts received in the state on account of insurance premiums for the six months last preceding, less losses actually paid within the state, an insurance company had the right in determining the amount of premium income subject to taxation to deduct from its book entries of gross premiums the amount of premiums represented by "flat"

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- cancellations of policies for which no premiums had been received, since the statute required it to pay taxes only on premiums received and retained. pp. 548, 556.
2. **STATUTE.—Construction.—Legislative Intent.**—On construing a statute the court is required to discover, if possible, the legislative intention in the enactment of the particular statute under consideration. p. 548.
 3. **INSURANCE.—Foreign Insurance Companies.—Exclusion from State.—Powers of Legislature.**—The legislature has the constitutional power to exclude foreign insurance companies from the state. p. 549.
 4. **TAXATION.—Taxation and Regulation of Foreign Insurance Companies.—Police Power.—Statute.—Construction.**—Section 4790 *et seq.* Burns 1914, §3765 R. S. 1881, regulating the business of foreign insurance companies in this state and §10216 Burns 1914, Acts 1891 p. 199, §67, imposing a tax upon the gross premium receipts of such companies, emanate from the police power of the state, and, being interrelated, should be construed together. p. 549.
 5. **INSURANCE.—Foreign Insurance Companies.—Privilege Tax.—Statute.**—Section 10216 Burns 1914, Acts 1891 p. 199, §67, requiring foreign insurance companies doing business in this state to pay taxes upon their gross premium income, imposes a tax upon a foreign corporation for the privilege of exercising its corporate franchises and carrying on a business in a corporate capacity within the state, and such tax is a graduated privilege tax. p. 550.
 6. **STATUTE.—Construction.—Imposition of Special Tax.**—Statutes imposing a special tax on corporations are within the rule that a statute providing for the imposition of taxes shall be strictly construed and that all reasonable doubts in respect thereto shall be resolved against the government and in favor of the citizen. p. 556.
 7. **TAXATION.—Foreign Insurance Companies.—Reinsurance.—Statute.**—Under §10216 Burns 1914, Acts 1891 p. 199, §67, imposing a tax on the gross premium receipts of foreign insurance companies doing business in this state, a foreign fire insurance company is not required to pay taxes on reinsurance premiums received from other companies on account of risks located in Indiana where the business is transacted in another state. p. 557.
 8. **INSURANCE.—Foreign Insurance Companies.—Taxation.—Rate.—Retaliatory Statute.—Enforcement.**—Under §7222 Burns 1914, Acts 1895 p. 319, providing that the auditor of state shall tax for the use of the State of Indiana, the fees, taxes and charges allowed by law, etc., and §4086 Burns 1914, §3773 R. S. 1881, providing that, where by the laws of any other state any taxes, fees, etc., or other obligations, are imposed upon insurance com-

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panies of this or other states, or their agents, greater than are required by the laws of this state, then the same obligations and provisions shall in like manner be imposed upon all insurance companies of such states and their agents, and §10216 Burns 1914, Acts 1891 p. 190, §67, the primary taxing statute, fixing a rate of two per cent. on the premiums received by foreign insurance companies doing business within the state, if the auditor of state should have before him the fact that the State of New York levies a lower rate on Indiana companies doing business in New York, he is not required by the retaliatory statute to make a corresponding reduction, but in that event he must adhere to the primary law, and it is only upon the happening of the contingency that the taxes imposed upon the insurance companies of Indiana or other states by the New York laws are greater than are required by the laws of this state that the retaliatory statute may be invoked. p. 561.

9. *STATUTE.—Retaliatory Statute.—Construction.—Enforcement.*—Section 4806 Burns 1914, §3773 R. S. 1881, being penal in its nature and involving the comity of states, must be strictly construed and executed with care. p. 562.

10. *INSURANCE.—Foreign Insurance Companies.—Taxation.—Retaliatory Statute.*—Under §4806 Burns 1914, §3773 R. S. 1881, providing that where by the laws of any other state any taxes, fees, etc., are imposed upon insurance companies of this or other states, or their agents, greater than required by the laws of this state, then the same shall be imposed upon all insurance companies of such states and their agents, a tax law of New York requiring the payment of net premiums to the fire department of cities and incorporated villages by fire insurance companies not organized under the laws of the State of New York, but doing business therein, would not be applicable, since premiums derived from insurance on farm property and on property in towns and villages not having fire companies, are taxed at the rate of two per cent.; the obligation to pay this tax is laid upon the local agent and not upon the company and the agent is liable to forfeiture for failure to discharge the obligation and the funds derived from the tax belonging to the municipality where collected and must be used for the benefit of its fire company or companies. p. 563.

From Marion Superior Court (90,589); *Charles J. Orbison*, Judge.

Action by the State of Indiana, on the relation of William H. O'Brien, auditor of state, against the Con-

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tinental Insurance Company of New York. From a judgment for defendant, the relator appeals. *Affirmed.*

R. M. Milburn and Ele Stansbury, Attorney-General, Horace M. Kean, George Shirts, Omar O'Horrow and U. S. Lesh, for appellant.

William L. Taylor and Thomas Bates, for appellee.

DAUSMAN, J.—This action was brought by the State of Indiana on the relation of the auditor of state against the Continental Insurance Company of New York to recover taxes alleged to be due and unpaid for the years from 1876 to 1911, inclusive.

In the first paragraph of complaint it is alleged that the Continental Insurance Company of New York is a foreign fire insurance company organized under the laws of the State of New York; that during said period of time it was engaged in the business of writing fire insurance, collecting premiums, and paying losses within the State of Indiana; that it was the duty of said company during said years, in the months of January and July of each year, to report to the auditor of state of the State of Indiana for the purposes of taxation the gross amount of all receipts received on account of premiums for insurance written on property in the State of Indiana for the six months last preceding, and at said times to pay into the treasury of the State of Indiana the sum of \$3 on every \$100 of gross receipts less losses actually paid within the state; that the total amount reported as gross receipts derived from insurance written in Indiana by the company during said period is \$8,430,-419.98; that the total amount of losses paid in Indiana during said period is \$4,117,332.36; that the

amounts so reported by the company as gross receipts were not the correct amounts, but that it actually received in Indiana during said period premiums amounting to the sum of \$9,007,410.93; that, after deducting from the correct amount of gross receipts the losses paid as aforesaid, the balance on which the taxes should have been paid is the sum of \$4,830,078.56; that the correct amount of taxes which should have been paid during said period is \$144,902.36; and that the taxes actually paid amount to \$128,783.78, leaving a balance due the State of Indiana in the sum of \$16,118.58, for which judgment is demanded.

This paragraph is based on §10216 Burns 1914, Acts 1891 p. 199, §67. Said section was enacted originally in 1873 and constituted §§8 and 9 of an act supplementary and amendatory of the general tax law of 1872. (Acts 1873 pp. 205, 208.) It was re-enacted as §83 of the general tax law of 1881. (Acts 1881 p. 611, §6351 R. S. 1881.) It was again re-enacted in 1891. (Acts 1891 p. 199, *supra*.) It has constituted a part of the statute law of this state continuously since 1873.

In the second paragraph of complaint it is alleged in substance that during all and each of the years from 1876 to 1911, inclusive, while said company was carrying on its business in the State of Indiana, the laws of the State of New York, in which said company had its home office, imposed a tax of two per cent. upon the gross premiums received on account of property insured in the State of New York by fire insurance companies not organized under the laws of the State of New York; that two per cent. of the gross premiums received by said company in the State of Indiana during said period was greater than

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three per cent. of said gross premiums less the losses actually paid; that the taxes which said company should have paid if computed at the rate of two per cent. on the gross premiums received by it on account of insurance written on property in the State of Indiana during said period amount to the sum of \$180,148.04; that the amount of taxes said company should have paid during said period if computed at the rate of three per cent. on gross premiums less losses actually paid is the sum of \$144,901.71; that the total amount of taxes actually paid by said company during said period is the sum of \$128,783.78; that, when the sum actually paid as aforesaid is deducted from the larger sum for which the company is liable as alleged, there remains due the State of Indiana a balance of \$51,364.26, for which judgment is demanded.

This paragraph is based on §4806 Burns 1914, being §3 of the act of 1877 (Acts 1877 p. 65), and commonly known as the retaliatory statute.

Underlying the complaint is the theory that it is the duty of the proper officers of the State of Indiana to collect taxes from foreign fire insurance companies doing business in this state, either under the three per cent. law or under the retaliatory law, depending upon which will produce the greater revenue.

The first paragraph of complaint the company answered by general denial only. To the second paragraph of complaint it addressed seven answers of the following purport: (1) General denial. (2) Payment of all taxes due before the commencement of the action. (3) That §3 of the act of 1877, *supra*, was repealed in 1891 in so far as it authorizes the collection of taxes from any foreign insurance company

doing business in this state. Acts 1891 p. 199, *supra*. (4) That the laws of the state of New York never imposed a tax of two per cent. on the gross amount of premiums received in that state by foreign fire insurance companies, but imposed on such companies a tax of two per cent. on the gross premiums received only in cities and towns having fire departments; that, if the New York law were applicable at all, it could only be applied to premiums collected by this company in cities and towns in Indiana having fire companies; and that it has paid more taxes under the three per cent. law than would be due under the two per cent. law on premiums collected in said cities and towns in this state. (5) That the State of Indiana is estopped by executive, legislative and departmental construction from enforcing the retaliatory statute. (6) Former adjudication. (7) That the laws of the State of New York do not provide a state tax on foreign fire insurance companies, but a municipal tax only, and that the retaliatory statute of this state is not applicable to New York companies.

To these affirmative answers the state filed a reply in denial.

At no time has there been any dispute concerning the correctness of the company's private account of the business done by it in this state. One of the items of evidence introduced by the state is a tabulated statement which shows by years the amount of "Gross Premiums" and the amount of "Returned Premiums." This statement was compiled from the company's books by accountants chosen by the state and who worked in conjunction with employes of the company. The parties agreed that this statement is correct. There is no dispute as to the amount of

losses paid by the company in this state. Indeed there is no dispute as to any other matter of fact.

The court made a special finding which is extensive, consisting of fifty-six items and covering forty pages of appellant's printed brief. No good purpose would be subserved by setting out the finding in full.

Upon the facts found the court stated the following conclusions of law, to wit:

"First. Under Section 10216 Burns R. S. 1914, requiring foreign insurance companies doing business in the State of Indiana to pay three dollars on every one hundred dollars of the gross amount of all receipts received by them in the State of Indiana on account of insurance premiums, less losses actually paid by them within the State, the defendant company is required to pay to the state three per cent. of the gross amount of premiums collected and retained by it upon all policies of insurance written upon property located within the state, and in the making of its semi-annual report and settlement with the auditor of state of the State of Indiana, under the provisions of said above noted section, the defendant had the right to deduct from the total amount of the gross premiums received by it upon insurance policies written upon property located in the state as shown by its books, all premiums returned to policyholders, all premiums on policies cancelled for failure on the part of the insured to pay the premiums, and all premiums charged on the books of the company where the policies of insurance were never delivered and never paid for by the insured.

"Second. The defendant company has fully complied with the provisions of Section 10216 Burns R. S. 1914, has fully paid the tax required of it under said

section, and is not indebted to the State of Indiana in any amount under and by virtue of said section.

“Third. The tax law of New York as pled in plaintiff’s complaint, requiring the payment of certain premiums to the fire departments of cities and incorporated villages by fire insurance companies not organized under the laws of the State of New York but doing business therein, does not apply to the case at bar, and even if said law applied there is nothing due or owing by the defendant to the State of Indiana, because the amounts paid by the defendant to the state under and by virtue of Section 10216 Burns R. S. 1914, are in excess of the amounts that would have been paid by said company under and by virtue of said New York law.

“Fourth. The plaintiff is not entitled to recover from the defendant and defendant is entitled to its costs.

“And the plaintiff at the time excepted separately to each said first, second, third and fourth conclusions of law.

“Chas. J. Orbison,

“Judge of Marion Superior Court.”

The alleged errors properly presented are that the court erred in each conclusion of law.

I. The substance of so much of the special finding as is necessary to an understanding of the issue on the first paragraph of complaint may be stated as follows: The Continental Insurance Company of New York is, and during the period stated in the complaint has been, a fire insurance company organized under the laws of the State of New York. At all times since its organization it has maintained its home office and principal place of business in the

State of New York. Since January 1, 1876, it has been doing business as a fire insurance company in the State of Indiana. During all said time it has been insuring property located in Indiana on account of fire, and part of the time on account of tornadoes. It has conducted its business through its agents, and the company and its agents during said period have been duly authorized to transact the business of fire insurance in the State of Indiana. During all said time the Company has maintained at the city of Chicago what is known and designated as its "Western Department." Its Western Department has had jurisdiction over all the business done by it in the State of Indiana, and in this department it has kept an agency register on which is a record of every policy written by the company in the State of Indiana. The company has required each of its agents in Indiana to make out and forward to its Western Department a report of each policy written and on the day written; and immediately upon receipt of the daily report at its Western Department a record was made thereof on said agency register and the amount of the premium stated in the policy was entered in a column under the heading "Gross Premiums."

Prior to the year 1911 the company allowed its agents sixty days, and since the year 1911, forty-five days, in which to collect premiums on policies written. Where a policy was rejected by the insured, or where the insured failed or refused to pay the premium, and the policy was surrendered to the agent, was treated as a canceled policy, was transmitted to the Western Department, and the premium stated in the policy was entered on the register in a column

under the heading "Returned Premiums," although no premium had been collected thereon. Where for any reason a policy was unsatisfactory to the insured and was exchanged by the insured for a new policy, the original policy was treated as a canceled policy, was transmitted to the Western Department, and the premium stated in the policy was entered on the register in the column under the heading "Returned Premiums," although no premium was ever collected thereon. These two groups of canceled policies are known as "flat cancellations" and the premiums represented by these two groups of policies constitute at least eighty per cent. of the total amount of the so-called returned premiums. Where the premium had actually been collected and the policy afterward canceled, whether at the instigation of the company or the insured, the policy was transmitted to the Western Department and the amount of premium actually refunded to the insured was entered on the register in the column under the heading "Returned Premiums."

In the month of July, 1876, and in the months of every succeeding January and July thereafter, including the month of January, 1912, the company has reported to the auditor of state of the State of Indiana, under oath of its president and secretary, for purposes of taxation, a statement of the gross amount of all premiums received on account of insurance written on property located in said state for the six months immediately preceding each report, the said tax periods ending on the last days of December and June of each year. These reports were made on blanks furnished by the said auditor. In making said reports the com-

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pany deducted from the gross premiums entered on its register the returned premiums entered on its register and reported the balance as the amount of gross premiums received. At the time of making each of said reports the company paid into the treasury of the State of Indiana the sum of \$3 on every \$100 of said gross premiums received, less the losses actually paid the policy holders on property located within the state.

The company did not write any reinsurance prior to the year 1906. Since that year it has received as reinsurance premiums from other foreign fire insurance companies authorized to do business in Indiana for reinsurance on property located in Indiana the sum of \$5,257.88. Said sum, or any part thereof, has never been reported to said auditor of state for the purpose of taxation.

On these facts two questions are presented: (1) Did the company have the right to deduct the amount of "Returned Premiums" as shown on its books from the amount of "Gross Premiums" as shown on its books and report only the balance for taxation as "Gross Premiums Received?" (2) Should the amount received by the company on account of reinsurance have been included in its statement of "Gross Premiums Received?"

Section 10216 Burns 1914, *supra*, reads as follows: "Every insurance company not organized under the laws of this state, and doing business herein, shall, in the months of January and July of each year, report to the auditor of state under oath of the president and secretary the gross amount of all receipts received in the state of Indiana on account of insurance premiums for the six months last preceding, ending on

the last day of December and June of each year next preceding, and shall at the time of making such report pay into the treasury of the state the sum of three dollars on every one hundred dollars of such receipts, less losses actually paid within the state, and any such insurance company failing or refusing for more than thirty days to render an accurate (account) of its premium receipts as above provided and pay the required tax thereon shall forfeit one hundred dollars for each additional day such report and payment shall be delayed, to be recovered in an action in the name of the state of Indiana on the relation of the auditor of state in any court of competent jurisdiction, and it shall be the duty of the auditor of state to revoke all authority of any such defaulting company to do business within this state."

When reading this statute the word "premiums" may be substituted for "receipts." When so read it puts upon the company the duty to report for

1. taxation "the gross amount of all premiums received in the State of Indiana * * * for the six months last preceding." That the statute does not require the company to pay taxes on premiums never received is too plain to require elucidation. It follows, then, that the company had the right to deduct from its book entries of gross premiums the amount of premiums represented by the "flat" cancellations—the latter, never having been received, are not taxable under the statute. But that the company had the right to deduct, as not taxable, the amounts actually refunded to policy-holders as returned premiums, does not appear upon the
2. face of the statute. The determination of the dispute on this point depends upon the legisla-

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tive intent; for the primary rule in statutory construction requires us to explore and discover, if possible, the legislative intention in the enactment of the particular statute under consideration. *State, ex rel. v. Insurance Company, etc.* (1888), 115 Ind. 257, 264, 17 N. E. 574.

Counsel for the state contend that in construing the statute the tax thereby created should be regarded as purely a privilege tax, while counsel for the

3. company suggest that it partakes of the nature of a property tax. The mere name by which the tax may properly be designated is not of controlling significance; but a clear conception of the legislative purpose and plan is essential. The legislature at all times had the constitutional power to exclude foreign fire insurance companies from the state. However, in its wisdom the legislature has not pursued the policy of exclusion, but has prescribed certain terms and conditions on which they may enter and pursue their business within the state. For more than half a century the legislature has maintained a consistent and definite scheme or plan for that purpose. Acts 1865 p. 105; §3765 R. S. 1881, §4790 *et seq.* Burns 1914. Under these statutes the entrance of foreign fire insurance companies into the

4. state has been conditioned upon their compliance with certain regulatory and precautionary conditions. Said statutes emanate from the police power of the state and are designed to prevent the victimizing of resident policy-holders by insolvent companies, and to secure to policy-holders valuable remedial rights which otherwise they would not possess. (§4790 *et seq.* Burns 1914, *supra.*) On complying with these statutes a foreign fire insurance com-

pany acquires the right to engage in business in this state; and, as evidence thereof, is entitled to receive a certificate or license from the auditor of state. It would have been a simple matter for the legislature arbitrarily to have fixed an amount which every fire insurance company, without discrimination, must pay into the state treasury for the privilege of doing business within the territorial limits of the state, and as a condition precedent thereto. Under that plan each company would take the chance of its investment proving to be profitable or unprofitable. But the legislature adopted a different plan of permitting each qualified company to enter the state without contributing in advance to the revenue of the state, on the condition that at the end of each semi-annual period it shall contribute to the public revenue according to the amount of business done within the state. The primary purpose of said §10216, *supra*, is to raise revenue. It is based on the theory that a foreign fire insurance company permitted to come into the state should contribute to the public revenue in proportion to the benefits actually received. The plan is eminently fair and just. Part of the penalty provided for nonpayment of this tax is the revocation of the license to do business within the state. These statutes are interrelated and should be construed together. The one provides for the entrance of a foreign fire insurance company into the state, and the other for its expulsion therefrom. The tax may properly be called a graduated privilege tax.

5. It is a semi-annual tax imposed upon a foreign corporation for the privilege of exercising its corporate franchises and carrying on business in a corporate capacity within the state. The considera-

tion for the tax is the insurance business done within the state during the six months, ascertained at the expiration of that period and expressed in the gross amount of premiums received.

Now, what is meant by the words “premiums received?” The legislature of the State of New York enacted the following statute: “An annual state tax for the privilege of exercising corporate franchises or for carrying on business in their corporate or organized capacity within this state equal to one per centum on the gross amount of premiums received during the preceding calendar year for business done in this state, whether such premiums were in the form of money, notes, credits, or any other substitute for money, shall be paid annually into the treasury of the state, on or before the first day of June by the following corporations: * * *

Subsequently said statute was enlarged in many respects and the following sentence was added: “The term ‘gross premiums’ as used in this article shall include, in addition to all other premiums, such premiums as are collected from policies subsequently cancelled and from reinsurance.”

In construing the foregoing statute, as enlarged, the New York Court of Appeals, in the case of *People, ex rel. v. Miller* (1904), 172 N. Y. 515, 70 N. E. 10, said: “What is the business done through a canceled policy? It is the insurance made or indemnity furnished during the period that the policy is in force. That is the only business that a fire insurance company can do. Every fire insurance policy in this state, by its terms, is subject to cancellation, and in that event it is provided both by the policy and by statute that the unearned premium shall be refunded

by the company. * * * Thus a policy for a specified time continues in force no longer than both parties elect, for either may end it at will. If a policy is written for one year, but is canceled after it has run six months, the business done by means of that policy is insurance of the property affected for six months. That period covers the entire life of the policy, and the company furnishes no insurance after it has expired. It then ceases to do business so far as that policy is concerned, and if all its policies were canceled at the same time it would cease to do business altogether.

“What is the amount collected, within the meaning of the act, upon such a policy, assuming that the premium for one year was paid in advance and that the proper proportion was refunded upon cancellation? The time of viewing the transaction, as is apparent from the time when the report to the comptroller is made and the tax fixed, is not the date of the policy but the date of cancellation, when the contract ends and insurance ceases. As the tax is paid for business done, and the business done is insurance for six months, the amount collected is either the sum collected and retained, or else it includes something for business not done, or unrealized anticipations of business. While in a certain sense it may be said that payment of the premium in advance for one year involves insurance made for one year, notwithstanding the fact that according to its terms the policy is subsequently canceled, a majority of the court is of the opinion that this is inconsistent with the fair meaning of the words ‘business done,’ when looked back upon at the end of the year. The premium which represents business done is the amount that the company

has the benefit of and furnishes an equivalent for. It is the money earned by the policy, for the rest is a liability. * * * When part of the premium is refunded, it is the same in effect as if it had never been paid. The contract is terminated pursuant to its provisions, and thereafter the company neither gives nor takes any benefit therefrom. It no longer does business, or provides insurance through that policy. If all its policies should be canceled on the first of July and it should issue no others during the rest of the calendar year, it could not properly be said that it did any insurance business during that period. A tax upon the sum repaid would be arbitrary, for it would have no relation to the privilege of exercising the corporate franchise for which in express terms the tax is imposed. If two companies during the same year should each receive \$100,000 in premiums and one should refund half while the other refunded nothing on canceled policies, taxation of both in the same amount would violate the theory of the act and trample upon the presumption that a tax is laid in return for some proportionate value received by the taxpayer. According to the construction that we have adopted, however, which impresses us as just and reasonable, the amount paid to the state would be in exact proportion to the value received by the corporation for the tax, and the object of the statute would thus be carried out in every respect. The company would have the benefit of doing the business and the state would have the revenue from all the business done.

“It may be asked: Why does the statute say gross premiums received, whether refunded or not? We think the use of the word ‘gross’ was intended to

include all premiums that remain in the treasury of the company and to exclude any deductions for the commissions of agents or the expense of doing business. The gross amount collected from canceled policies means the gross amount collected and retained by the company. The amount paid back is not collected for business done, but received for business expected to be done. The key to the construction of the statute is business done, for that is the basis of the tax. The state allows the corporation to do business and taxes it for such business as it actually does, not for business attempted but never completed. A canceled policy does not represent business done after the date of cancellation, for no business is done through that policy after that date. The exercise of the right to cancel interrupts the business being done by the policy and *ipso facto* renders the company liable to repay the unearned premium, and we think it would be unreasonable to hold that the sum refunded is, for the purposes of taxation under this statute, actually collected."

In construing a statute similar to our own, the Supreme Court of Illinois, in the case of *German Alliance Ins. Co. v. VanCleave* (1901), 191 Ill. 410, 61 N. E. 94, said: "It is claimed on one side that the legislature meant by the gross amount of premiums the entire premiums received for furnishing insurance indemnity during the year, while on the other side it is insisted that they meant to include all the money which comes to an insurance company, although paid under an agreement for refunding upon the cancellation of the policy, and although the policy is canceled and the insurance ceases and the money is refunded. If it is true that a part of a premium

unearned and returned to the insured is premium for business done, it is equally true that if a whole premium were returned and there was in fact no insurance the money would be premium for business done. According to the argument which would include premiums returned on canceled policies, if an insurance company should issue a policy and receive a premium and at once cancel the policy and return the premium it would have done the amount of business represented by the policy and the amount received would be a premium for insurance business done. We do not think the language used will bear that construction. The merchant would not think of including in the gross receipts of his business any sales of goods with the privilege of return on the part of the purchaser, where they are in fact returned. In such a case there is in the end no sale and no business done, in any proper sense. So in the case of an insurance policy for a definite period with an agreement that it may run any portion of that period and then cease; if the policy is canceled and the insurance ceases there is no insurance business for the remaining portion of that period. The premiums returned are not paid as a liability of the insurance company or as a charge or expense of conducting the business, but because one party or the other avails of the option and terminates the insurance. An insurance company would not be authorized to omit from its statement any part of premiums received merely on the ground that policies might be canceled in the future; but where they have been in fact canceled and the money returned, the entire or gross premium receipts cannot, by any fair interpretation, include the moneys so returned. The two per cent. collected by the insur-

ance superintendent and paid under protest is upon moneys which did not inure to the benefit of the insurance companies in any manner, and which are not premiums for furnishing fire insurance or indemnity to holders of policies. The apparent purpose of the act is to levy a tax on gross income, and not upon money which is in no sense revenue to the insurance companies.”

To the same effect are the following cases: *Mutual Benefit Life Ins. Co. v. Commonwealth* (1908), 128 Ky. 174, 107 S. W. 802; *State v. Fleming* (1903), 70 Neb. 529, 97 N. W. 1063; *State v. Hibernia Ins. Co.* (1886), 38 La. 465. We adopt the reasoning of these learned courts.

For the purpose of taxation the company’s private record kept in accordance with a plan of bookkeeping designed for its own peculiar needs is not con-

1. clusive. In computing the amount on which the company was liable for the payment of taxes, it had the right to deduct the sums refunded as returned premiums to policy-holders in this state from the gross premiums entered on its register. In other words, it was required by the statute to pay taxes only on the total amount of premiums received and earned; or, as the trial court has stated, on premiums received and retained.

Under the terms of the statute, was it the duty of the company to pay taxes to the State of Indiana on reinsurance premiums received from other

6. companies on account of risks located in Indiana? Statutes like the one under consideration, imposing a special tax on corporations, are within the rule that a statute providing for imposition of taxes shall be strictly construed and that all

reasonable doubts in respect thereto shall be resolved against the government and in favor of the citizen. *Mutual Benefit Life Ins. Co. v. Herold* (1912), (D. C.) 198 Fed. 199. In *State v. Hibernia Ins. Co.*, *supra*, the Supreme Court of Louisiana said: "The terms of the law would have to be very clear and unambiguous, to command our assent to a construction of it, which would sanction a legislative intent to impose a license tax upon business pursued by the corporation in a different state, or even to refer to the receipts of such business as a basis for the graduation of a license tax."

As we construe said §10216, the legislative intent expressed therein is that the tax shall be imposed only on business done within the territorial

7. boundaries of the State of Indiana. The license is upon the business and the tax is laid on "every insurance company not organized under the laws of this state, and doing business therein." Where a foreign company takes over from another foreign company, for the purpose of reinsurance, risks on property in this state, the transaction is, of course, between the companies, and the insurer would not be subject to the tax on the reinsurance premium received if the business was not done in this state. And this would be so whether the companies were licensed to do business in this state or not.

It appears from the special finding that the reinsurance business involved in this case was transacted at the city of Chicago in the State of Illinois. Therefore, under the terms of the statute, the company is not required to pay taxes to the State of Indiana on said reinsurance premiums. Moreover, reinsurance

is not mentioned in the statute, and we are not at liberty to broaden its scope by construction.

The court found that, during the period of time stated in the complaint, the company has paid into the state treasury the sum of \$129,928.07, being full payment of all taxes for which it was liable under the three per cent. law, if it had the right to exclude from its so-called "Gross Premiums" the disputed items, viz., premiums entered on its register but never received, returned premiums on canceled policies, and premiums received without this state from other companies on account of reinsurance on property located within this state. In view of our construction of the statute, it had that right; and therefore the trial court did not err in its conclusions of law with respect to the first paragraph of complaint.

II. The substance of the facts found under the issues on the second paragraph of complaint is as follows:

The following are all the statutes enacted by the legislature of the State of New York that pertain to the taxing of premiums on policies of fire insurance companies not organized under the laws of that state but doing business therein (as pleaded and proved in this cause): (a) The act of May 28, 1875, being chapter 465 of the laws of 1875, appearing in Session Laws of 1875 at page 531. (b) Said act was superseded by the act of May 18, 1892, being chapter 38 of the General Laws of that state, and appearing in Session Laws of 1892 at page 1989. (c) Said act of 1892 was superseded by the act of May 11, 1901, appearing in Session Laws of 1901 at page 1782. (d) Said act of 1901 was superseded by the act of February 7, 1909, the part thereof which is essential to this case

being §133 of the Consolidated Laws of the State of New York, pages 1793 to 1795, inclusive. (e) The act of May 4, 1897, being §799 of the Laws of New York, Charter of New York City.

The first four of said acts are general laws and the material part thereof is the provision requiring every person who shall act as agent for any foreign fire insurance company to pay to the treasurer of the fire department of every city or village (except the city of New York) having a fire department, company or organization, for the use and benefit of such department, the sum of two dollars upon the hundred dollars, and at that rate, on the amount of all premiums received by such agent for insurance effected or procured by him on property located within the corporate limits of such city or village or within the fire limits of such unincorporated village, during the year or part of a year ending on the last day of December. The last of said acts applies to the city of New York only and requires a like payment by such agents to the treasurer of the fire department of said city, on all premiums received on policies written on property located in said city.

During the period of time stated in the second paragraph of complaint, appellee company received premiums on policies covering farm property in the State of Indiana amounting to the sum of \$4,345,-269.22, and during said period received premiums on policies covering property located in cities, towns and villages in the State of Indiana, including those with fire departments and those without fire departments, amounting to the sum of \$3,103,206.61. None of the farm property covered by said insurance was situated within the corporate limits of any city, town, or

village having a fire department; but a portion of said premiums was derived from policies written on property located in cities, towns and villages which had no fire departments. The company has paid to the State of Indiana as taxes under the three per cent. law during said period of time the sum of \$129,928.07. Three per cent. of the gross amount of all premiums received by the company on policies written by it in the State of Indiana from 1876 to 1911, both inclusive, less actual losses paid within the state, amounts to much more than would two per cent. upon all premiums received by the company within the state during all of said years on policies written by the company on property situated within the corporate limits of all cities, towns and villages of the State of Indiana, having fire departments.

On these facts, did the court err in its conclusion of law with respect to the second paragraph?

The statute on which this paragraph is based is in the following language: "Where by the laws of any other state, any taxes, fines, penalties, licenses, fees, deposits of money or securities, or other obligations or prohibitions are imposed upon insurance companies of this or other states, or their agents, greater than are required by the laws of this state, then the same obligations and provisions, of whatever kind, shall in like manner for like purposes be imposed upon all insurance companies of such states and their agents. All insurance companies of other nations, under this section shall be held as of the state where they have elected to make their deposit and establish their principal agency in the United States."

In no event can the New York statutes become operative in this state *as laws*. Under §4806, *supra*,

the New York statutes become *facts* in the hands of the auditor of state of Indiana, which facts he should consider when he comes to fix the liability of New York companies doing business in this state. (§7222 Burns 1914.) Section 10216, *supra*, is the primary taxing statute and fixes the rate at three per cent. of the premiums received. If the auditor of state should have before him the fact that the State of New York levies a lower rate on Indiana companies doing business in New York, he is not required by the retaliatory statute to make a corresponding reduction, but in that event he must adhere to the primary law. It is only upon the happening of a certain contingency that he is permitted or required to deviate from the primary law. For the purposes of this case, the contingency depends on whether by the laws of New York any taxes have been imposed upon insurance companies of Indiana or of states other than New York, *greater* than are required by the laws of Indiana. In discussing the meaning of this statute, counsel for the state say: "In determining this fact, he (the auditor of state) has but one thing to guide him—the basis and rate imposed by the New York law. He has no means of determining, and is not required to determine, where insurance companies of this or other states write their insurance in New York, whether in the country or in cities and towns, or whether they write any insurance at all."

In this statement we concur, but we do not concur in their application of it. It will be observed that the New York statutes make no allowance for losses paid; and it is contended that a rate of two per cent. on all premiums received by appellee in Indiana, without

regard to losses paid in Indiana, might yield more revenue in certain taxing periods than the three per cent. rate on the balance after deducting said losses—depending upon the proportion the losses sustained happen to bear to the premiums received. The argument is that if the company's semi-annual report shows that it has been unfortunate and has paid losses during that period in excess of one-third of the premiums received, then it should be denied the right to deduct the losses and should be compelled to pay two per cent. of the total premiums. But if it has been fortunate and has paid losses amounting to less than one-third of the premiums received, then it should be permitted to deduct the losses and should be compelled to pay three per cent. on the balance. In other words, when the auditor of state comes to decide whether the primary law or the retaliatory law shall be applied, he should have in mind but one question, viz.: Which law, on the facts disclosed by the report, will put the greater number of dollars into the treasury? This argument ignores the luminous fact that the enactment of the retaliatory statute was not prompted by a tender solicitude for the public treasury, but rather by the desire to secure for the fire insurance companies of Indiana even-handed treatment by the legislatures of other states. This end it seeks to attain through the *lex talionis*. The

9. retaliatory statute plainly demands “an eye for an eye, and a tooth for a tooth.” Being penal in its nature and involving the comity of states, it must be strictly construed and executed with care. 14 R. C. L. 863; *Talbott v. Fidelity, etc., Co.* (1891), 74 Md. 536, 22 Atl. 395, 13 L. R. A. 584; *State, ex rel. v. Insurance Co.* (1892), 49 Ohio St. 440,

State, ex rel. v. Continental Ins. Co.—67 Ind. App. 536.

31 N. E. 658, 16 L. R. A. 611, 34 Am. St. 573; *Germania Ins. Co. v. Swigert* (1889), 128 Ill. 237, 21 N. E. 530, 4 L. R. A. 473; *Haverhill Ins. Co. v. Prescott* (1861), 42 N. H. 547, 80 Am. Dec. 123. The taking of an eye for a tooth, or a tooth for an eye, cannot be permitted. The statute demands like for like. It plainly directs that "the same obligations and provisions of whatever kind, shall in like manner and for like purposes be imposed," etc. The amount of revenue that may be derived under this statute is a fact legitimately to be considered, but it is incidental to the main purpose of the statute. There are other facts of equal importance which also must be considered. Indeed, none of the facts within the purview of the statute can be ignored.

In the case at bar the auditor of state, in attempting to apply the retaliatory statute, would be confronted by the following facts arising out of

10. the New York laws: (1) That premiums derived from insurance on farm property and on property in towns and villages not having fire companies, are not taxed at all; (2) that premiums derived from insurance on property in cities, towns and villages having fire companies, are taxed at the rate of two per cent.; (3) that the obligation to pay this tax is laid upon the local agent, not upon the company, and the agent is liable to forfeiture for failure to discharge the obligation; and (4) that the funds derived from this tax belong to the municipality where collected and must be used for the benefit of its fire company or companies. Now, when we come to transfer this identical situation to the State of Indiana and attempt to impose on appellee *the same obligation in the same manner and for the same*

purpose, it becomes apparent that the retaliatory statute cannot be enforced in this action.

Moreover, the trial court found from the evidence that the company has paid more in taxes under the primary law than could have been collected under the retaliatory law. This finding must stand. So that even on appellant's own theory, this finding puts an end to the controversy.

The trial court did not err in its conclusions of law with respect to the second paragraph of complaint.

The conclusion we have reached makes it unnecessary that we should consider the other questions presented by appellee's answers. Judgment affirmed.

NOTE.—Reported in 116 N. E. 929. See under (1) 37 Cyc 841; (3, 5) 22 Cyc 1391; (7) 37 Cyc 841.

MILLER v. RAYBURN.

[No. 9,442. Filed December 7, 1917. Rehearing denied March 1, 1918. Transfer denied May 3, 1918.]

1. *APPEAL—Review.—Evidence.—Sufficiency.—Conflicting Evidence.*
—Although the evidence is conflicting, the court on appeal will not disturb the jury's verdict where there is some evidence to sustain it. p. 566.
2. *APPEAL—Review.—Harmless Error.—Duplicating Instructions.*
—Although the repetition of the same proposition in a number of instructions is not good practice, it will not constitute reversible error, where such instructions were not erroneous and there was nothing in the instructions or in the record to show that appellant was harmed, since it cannot be presumed in such case that the instructions were harmful. p. 566.
3. *TRIAL.—Instructions.—Consideration of Evidence.*—In an action for damages for assault and rape, an instruction calling attention to matters collateral to the main issue upon which evidence had been offered, and stating that such evidence would be

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considered only in determining whether defendant committed the alleged assault and rape, was favorable to defendant, and was not objectionable as singling out certain phases of the evidence. p. 567.

From Greene Circuit Court; *Theodore E. Slinkard*, Judge.

Action by Jennie Rayburn against William A. Miller. From a judgment for plaintiff, the defendant appeals. *Affirmed*.

Harry R. Lewis, W. H. Hill and Webster V. Moffett, for appellant.

Wade & Padgett, for appellee.

FELT, J.—This is an action by appellee, Jennie Rayburn, against appellant for damages for an alleged assault and rape. The complaint in one paragraph was answered by a general denial. A trial by jury resulted in a verdict for \$2,500. Appellant's motion for a new trial was overruled, judgment was rendered on the verdict, and an appeal prayed and granted.

The error assigned and relied on for reversal is the overruling of appellant's motion for a new trial. A new trial was asked on the ground that the verdict is not sustained by sufficient evidence, that it is contrary to law, and error in the giving and the refusal of certain instructions. The main contention as to the evidence is that appellee's account of the several alleged assaults is unreasonable and unbelievable because of inconsistencies and alleged impossibilities.

The evidence is long and there is no necessity for setting it out in this opinion. Appellee testified to a number of assaults and attempts on the part of appellant to have sexual intercourse with her; that he took hold of her person and clothing, exposed his person in a lascivious way, and on one occasion threw

her down and accomplished his purpose without her consent and against her will; that her foot caught in some sacks on the floor of the chicken house where she was assaulted, and appellant pushed her over or threw her down; that she struggled and resisted him as much as she could under the circumstances, but without avail. Appellant's testimony was in substance a denial of practically everything sworn to by appellee that in any way related to the issues of the case.

The question was one of credibility. The jury saw the parties, heard the testimony and decided in appellee's favor. The alleged inconsistencies do

1 not take the case out of the well-established rule of this court that where the evidence is conflicting and there is some evidence to sustain the verdict, the court on appeal will not disturb the finding of the jury. There is some evidence tending to sustain every material averment of the complaint. *Rahke v. State* (1907), 168 Ind. 615, 622, 623, 81 N. E. 584; *McGlone v. Hauger* (1913), 56 Ind. App. 243, 104 N. E. 116.

Appellant complains of the action of the court in giving a number of instructions tendered by appellee which it asserts were verbatim copies of the

2. essential portions of instructions given by the court of its own motion. The court did in effect duplicate several instructions on the same subject by giving its own instructions and also those tendered by the parties.

The instructions complained of in substance state the issues to be tried, that the suit was a civil action and that the material averments need only be proved by a preponderance of the evidence to warrant a recovery, the character of the assault and battery

involved in the suit, the extent and character of resistance of appellee to be proved, to characterize the assault as a rape or attempted rape, the substance of the issues that must be proved to warrant a recovery, the measure of damages if the jury found for the plaintiff and some kindred questions.

The repetition of the same proposition to the extent shown in this case cannot be commended as good practice, but there is no indication that appellant was in any sense injured by the instructions so given. It is not claimed that these instructions were erroneous, and therefore we cannot presume that appellant was harmed by them as in cases of erroneous instructions upon a material proposition in the case.

The mere assertion that appellant was harmed by such repetitions is not sufficient to show harmful error where there is nothing in the instructions or in the record to show that appellant was harmed. *Miller v. Coulter* (1900), 156 Ind. 290, 298, 59 N. E. 853; *White v. State* (1899), 153 Ind. 689, 692, 54 N. E. 763.

It is asserted that instruction No. 5 given by the court of its own motion is erroneous because it calls attention to certain phases of the evidence and does not refer to all the evidence; that the court states the inferences to be drawn from such evidence.

The court in the instruction calls attention to certain matters collateral to the main issue upon which evidence had been offered and told the jury

3. that such evidence was to be considered to aid it in "determining the main facts in the case, namely, whether the defendant committed the assault and battery and rape as alleged in the complaint." There is no basis for the contention that the court drew and stated any inferential fact in the instruc-

tion, nor does the instruction fairly construed belong to that class of instructions which single out certain phases of the evidence and emphasize it to the exclusion of other portions of the evidence. The effect of the instruction, if any, was favorable to appellant for it called attention to the fact that such evidence could only be considered to the extent, if at all, that it aided the jury in determining the main issuable facts of the case.

We find no reversible error in the giving of any instruction, or in the refusal to give any instruction tendered by appellant and refused by the court.

The instructions given, though subject to criticism for unnecessary repetition of certain statements, nevertheless state the law fairly and accurately, under the issues and the evidence.

No reversible error is shown. Judgment affirmed.

NOTE.—Reported in 117 N. E. 879.

STANDARD CABINET MANUFACTURING COMPANY v. ILIFF.

[No. 10,224. Filed May 3, 1918.]

MASTER AND SERVANT.—*Workmen's Compensation.—Compensation Agreement.—Jurisdiction of Industrial Board.*—An agreement between an employer and an injured employe for payment to the latter of a certain sum per week during total disability and the necessary surgical and medical expenses for the first thirty days, which agreement was incomplete and not in accordance with the statute, though it had been filed with, and approved by, the Industrial Board, was not so conclusive as to force the employe to bring action thereon in the circuit court to enforce his rights upon the employer's discontinuance of payments, since such agreement was not binding on the employe, nor did it terminate the jurisdiction of the board; and the board had power

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on application of the employe to grant an award which took into account the payments made under such agreement.

From the Industrial Board.

Proceedings under the Workmen's Compensation Act by William P. Iliff against the Standard Cabinet Manufacturing Company. From an award for the applicant, the defendant appeals. *Affirmed.*

Taylor, White & Wright, for appellant.

Albert Ward, for appellee.

DAUSMAN, J.—On February 18, 1917, appellee, while employed by appellant as a workman in its factory, received personal injuries by accident arising out of his employment. On March 20, 1917, the parties entered into an agreement with respect to compensation as follows:

“(1) That the average weekly wages of the employe at the time of his injury in the employment in which he was engaged were \$11.80. (2) That the employe shall receive compensation at the rate of \$6.49 per week during total disability for such time as he may be entitled to, beginning on the 5th day of March, 1917. (3) That the employer shall pay the necessary and reasonable surgical, medical and hospital expenses of the employe for the first thirty days after the injury.”

The agreement was filed with, and approved by, the Industrial Board. Appellant paid the weekly installments of compensation in accordance with the agreement to August 13, 1917, at which time the payments were discontinued. The reason for discontinuing these payments is not disclosed. On September 14,

1917, appellee filed with the board his petition for an award. Appellant filed a document which it calls a "special answer." This document avers the making, filing and approving of the agreement; that the agreement has not been modified or canceled and remains in force; that appellant has fully performed its part of the agreement; and that the board has no jurisdiction of the subject-matter nor of the person of the appellant. A hearing before one member resulted in an award, and thereupon appellant procured a review before the full board. On review the board made an award of compensation at the rate of \$6.49 per week, beginning March 5, 1917, to continue during the period of total disability, not exceeding 500 weeks, and ordered that appellant be given credit for the payments made under said agreement.

It appears that the agreement was procured by the insurance carrier; that the agreement is not in accordance with the form prescribed by the board for that purpose; that it is incomplete and not in full compliance with the statute. Appellant's contention is that if appellee is dissatisfied with appellant's conduct in discontinuing the payments under the agreement, he should file the agreement in the proper circuit court and seek a judgment thereon, and that he has no other remedy. We are not informed as to what advantage appellant expects to gain by having that procedure followed, and we are unable to understand why that position should be assumed, unless appellant's insurance carrier is of the opinion that by procuring the agreement it escaped liability for the payment of any compensation which might become due by reason of partial disability following the period of total disability. But the law cannot be evaded in

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that manner. An incomplete agreement, though approved by the board, does not terminate the board's jurisdiction. *In re Stone* (1917), 66 Ind. App. 38, 117 N. E. 669. Appellee had the right to ignore the pretended agreement. §57 W. C. A., Acts 1915 p. 392. By taking into account the payments made under the pretended agreement, the board has done ample justice to appellant.

The award is affirmed, and by virtue of the statute the amount thereof is increased five per cent.

NOTE.—Reported in 119 N. E. 479.

EVANSVILLE AND TERRE HAUTE RAILROAD COMPANY v.
HOFFMAN.

[No. 9,466. Filed December 20, 1917. Rehearing denied May 5, 1918.]

1. TRIAL.—*Instructions.—Cure of Error.*—In an action for personal injuries, instructions hypothesizing the finding of negligence, proximate cause, and consequent injury and damages were not erroneous for failing to hypothesize plaintiff's freedom from contributory negligence, where such instructions dealt only with the complaint and plaintiff's right to recover on proof of certain averments and by other instructions the court informed the jury that plaintiff could not recover unless he was free from contributory negligence. p. 574.
2. TRIAL.—*Instructions.—Cure of Error.*—Instructions are not erroneous because they do not apply to all the separate issues involved, where such issues were covered by other instructions. p. 575.
3. APPEAL.—*Review.—Harmless Error.—Instructions.*—In an action for personal injuries, error, if any, in instructions because omitting any reference to contributory negligence was harmless, where there was no evidence of such negligence. p. 575.
4. RAILROADS.—*Crossing Accidents.—Trial.—Instructions.—Care Required.*—In an action against a railroad company for personal injuries sustained in a collision between its train and a street car

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in which plaintiff was riding, error, if any, in instructing the jury that the street car company owed plaintiff, as a passenger, only ordinary care and diligence in operating its car over the crossing, was harmless, since the railroad company had the right to rely only on the street car company's duty toward it, which was that of using only ordinary care to avoid the collision, and it could not rely on the street car company discharging a higher degree of care toward its passengers. pp. 575, 577.

5. RAILROADS.—*Crossing Accidents.—Duty to Street Car Passengers.*—A railroad company owes a street railroad company crossing its tracks the same duty as it owes pedestrians and the drivers of private vehicles, which is ordinary care and diligence not to inflict injury on them in the operation of its engines and cars. p. 576.
6. TRIAL.—*Instructions.—Consideration of Evidence.*—An instruction that certain questions of fact must be determined from "all the evidence in the case" was not erroneous because of the use of the words quoted, where, when considered in their relation to the preceding portions of such instruction, it was apparent that the jury could not have understood that they were to consider any evidence, in determining the questions to which the instruction was addressed, except such as properly bore thereon. p. 577.
7. APPEAL.—*Review.—Harmless Error.—Instructions.*—Error, if any, in an instruction permitting the jury, in determining questions of fact, to consider evidence not bearing thereon was harmless, where appellant failed to point out any evidence which could have improperly influenced the jury in their determination of the questions covered by the instruction. p. 578.
8. RAILROADS.—*Crossing Accidents.—Duty to Use Air Brakes.—Question for Jury.*—Although there was no statute requiring air-brake equipment and the use thereof, yet, where railroad cars were in fact so equipped, whether it was the railroad company's duty to use the air brakes to avoid a crossing collision with a street car depended on whether such use was reasonably necessary in the discharge of its duty to use ordinary care and diligence, and such question was one of fact for the jury in a street car passenger's action against the railroad for injuries sustained in the collision. p. 578.
9. TRIAL.—*Instructions.—Conflict.*—In an action against a railroad company for personal injuries sustained in a collision between its train and a street car in which plaintiff was riding, an instruction that defendant owed no duty to equip its cars with air brakes, and have them connected and in use merely to avoid injury to street cars or other vehicles which might be imperiled at crossings through the negligence of persons in charge of them was

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and not in conflict with an instruction that failure of defendant's servants to use air brakes with which the cars were equipped to avoid the collision would be considered on the issue of defendant's negligence. p. 580.

10. **APPEAL.—Review.—Harmless Error.—Instructions.—Conflict.**—Any conflict between a correct instruction and an erroneous one given at appellant's request, which was more favorable to it than the law warrants, is harmless. p. 580.
11. **APPEAL.—Waiver of Error.**—Alleged error is waived by failure to properly present it on appeal. p. 581.
12. **APPEAL.—Briefs.—Sufficiency.**—Where the only reference made in appellant's propositions or points to alleged error in refusing a requested instruction is, "The court erred in refusing to give instruction No. 9 requested by defendant, and set out ante p. 19," no question is presented for review, since such statement is not a compliance with Rule 22, cl. 5, of the rules of the Appellate Court governing the preparation of briefs. p. 581.
13. **APPEAL.—Briefs.—Sufficiency.**—Failure to comply with Rule 22, cl. 5, of the Appellate Court, requiring under a separate heading of each error relied on separately numbered propositions or points, etc., cannot be cured by a discussion of the alleged error in the argument. p. 581.
14. **WITNESSES.—Impeachment.—Cross-Examination.**—Where, in an action for personal injuries, a witness on cross-examination denied that he had been indicted in another state for violation of liquor laws and the statutes regulating the sale of cigarettes to minors, he could not be impeached by evidence that he had been arraigned on several indictments for such offenses, pleaded guilty and paid his fines, and by introducing certified copies of the court records of that state of such prosecutions, since, while a court may, in its discretion, permit a witness to be interrogated as to specific extraneous offenses and conduct calculated to degrade him, and thus impair his credibility as a witness, the party propounding the interrogatory is bound by the answer the witness gives, and will not be permitted to introduce substantive evidence to contradict it. p. 582.
15. **TRIAL.—Jury Questions.**—Where reasonable minds may differ upon the conclusions and inferences to be drawn from the evidence, the question is one of fact for the court or jury trying the same. p. 583.

From Daviess Circuit Court; *James W. Ogden*, Judge.

Action by George Hoffman against the Evansville

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and Terre Haute Railroad Company. From a judgment for plaintiff, the defendant appeals. *Affirmed.*

John E. Iglehart, Edwin Taylor, Gardiner, Tharp & Gardiner, Homer T. Dick, Eugene H. Inglehart, for appellant.

James M. House, A. J. Padgett, Leroy M. Wade and Alvin Padgett, for appellee.

BATMAN, P. J.—Appellee brought this action in the court below to recover damages for personal injuries, which he alleged he received through the negligence of appellant in the operation of a switch engine and certain empty freight cars on one of its sidetracks in the city of Vincennes, Indiana, thereby causing a collision with a street car in which he was a passenger. Issues were formed, trial had, and judgment rendered for appellee. On appeal the judgment was reversed because of errors in instructions. *Evansville, etc., R. Co. v. Hoffman* (1914), 56 Ind. App. 530, 105 N. E. 788: A second trial of the cause was had in which a verdict was returned in favor of appellee, and judgment rendered accordingly. Appellant filed its motion for a new trial, which was overruled, and has assigned such ruling of the court as the error on which it relies for reversal. Among the reasons on which such motion for a new trial is based is the action of the court in giving instructions Nos. 5, 8, 9, 10, 11, and 12 on its own motion, which we will consider in the order named.

Appellant contends that the giving of said instructions Nos. 5 and 8 was error, for the reason that they each hypothesize the finding of negligence,

1. proximate cause, and consequent injury and damages, and thereon direct the jury to return

a verdict for appellee, but fail to hypothesize freedom from contributory negligence on appellee's part. We cannot concur in this contention. The court, by the instructions in question, was dealing alone with the complaint, and the right of appellee to recover on the proof of certain facts alleged therein. By other instructions the court informed the jury that appellee could not recover, unless at the time of the collision and injury he was in the exercise of ordinary care and diligence to avoid injury to himself. The instructions in question cannot be held to be erroneous,

2. ous, because they do not apply to all the separate issues involved in the case, where such issues were covered by other instructions given by the court. *Newcastle Bridge Co. v. Doty* (1906), 168 Ind. 259, 79 N. E. 485; *Indiana Union Traction Co. v. Keiter* (1910), 175 Ind. 268, 92 N. E. 982; *Harmon v. Foran* (1911), 48 Ind. App. 262, 94 N. E. 1050, 95 N. E. 597; *Home Tel. Co. v. Weir* (1913), 53 Ind. App. 466, 101 N. E. 1020. Moreover, there was no evidence on the trial of said cause that tended to prove that

3. appellee's negligence contributed to his alleged injuries. Therefore, the omission from such instruction of any reference to such negligence on the part of appellee, if error, was harmless. *Knoefel v. Atkins* (1907), 40 Ind. App. 428, 81 N. E. 600; *Neely v. Louisville, etc., Traction Co.* (1913), 53 Ind. App. 659, 102 N. E. 455; *Indianapolis Union R. Co. v. Waddington* (1907), 169 Ind. 448, 82 N. E. 1030.

Appellant also contends that the court erred in giving instruction No. 9, the objectionable portion being as follows: "The persons who had control

4. of the street car, which collided with the defendant's car on the crossing, were in duty

bound to exercise ordinary care and diligence in running said street car upon and over said crossing, in such manner as to avoid causing any injury to passengers on said street car." It insists that this statement renders such instruction erroneous, inasmuch as the street car company, whose passenger appellee was at the time of the collision, owed him the highest degree of care, and that it was harmful because the duties owed by the train crew depended somewhat upon the rights and duties of the street car crew, as the former had a right to believe, up to the moment of perceiving the contrary, that the latter would perform its duties, without negligence, and had a right to rely and act on such belief. If it be conceded that such street car company owed appellee a higher degree of care than was stated in such instruction, still it would not follow that its giving was harmful. On the trial of the cause the jury was required to determine whether appellant's train crew was guilty of any negligence in the operation of its said engine and cars which proximately contributed to appellee's alleged injuries. Under the law appellant owed

5. appellee, and the company in whose street car he was a passenger at the time of the alleged collision, the same duty as it owed pedestrians and the drivers of private vehicles, viz., ordinary care and diligence not to inflict injury on them in the operation of its engine and cars. *Vincennes Traction Co. v. Curry* (1915), 59 Ind. App. 683, 109 N. E. 62; *New York, etc., R. Co. v. New Jersey, etc., R. Co.* (1897), 60 N. J. Law 52, 37 Atl. 627, 38 L. R. A. 516; *Klinger v. Union Traction Co.* (1904), 92 App. Div. 100, 87 N. Y. Supp. 864. The street car company owed the

railroad company only ordinary care to avoid

4. the collision in question, and that is all the care the railroad company had a right to rely on in the operation of its engine and cars. It could not rely on the street car company discharging a higher degree of care towards its passengers, and thus relieve itself from liability to such passengers, for a failure to exercise ordinary care toward them. *Dean, Admx., v. Cleveland, etc., R. Co.* (1917), 65 Ind. App. 225, 115 N. E. 92; *Jacowicz v. Delaware, etc., R. Co.* (1914), 87 N. J. Law 273, 92 Atl. 946, Ann. Cas. 1916B 1222. It follows that the giving of such instruction, if error, was harmless.

Appellant also predicates error on the action of the court in giving said instruction No. 10 by the use therein of the following statement: "As

6. to whether or not the conditions existed as stated in this instruction, are all questions of fact which you are to determine under *all the evidence in the case.*" The specific objection is directed to the words italicized by us. Preceding the use of the sentence quoted, the instruction treats of the respective rights of the railroad company and the street car company with reference to the crossing in question, including the duty of those in charge of such street car to stop the same and permit the cars of appellant to pass over such crossing under certain conditions. It is apparent from the connection in which the words in question are used that the jury could not have understood that they were to consider any evidence, in determining the questions to which such instruction was addressed, except such as properly bore thereon. *Pittsburgh, etc., R. Co. v. Reed* (1909), 44 Ind. App. 635, 88 N. E. 1080; *Cohen v. Reichman* (1913), 55 Ind.

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App. 164, 102 N. E. 284. Moreover, appellant 7. has failed to point out any evidence which in our judgment could have improperly influenced the jury in determining the question covered by such instruction, had it been considered. The error, if any, was therefore harmless. *Mesker v. Leonard* (1911), 48 Ind. App. 642, 96 N. E. 485; *Sanitary Can Co. v. McKinney* (1912), 52 Ind. App. 379, 100 N. E. 785; *Inland Steel Co. v. Gillespie* (1913), 181 Ind. 633, 104 N. E. 76.

Appellant claims that said instruction No. 11 invades the province of the jury, and is therefore erroneous. This instruction only purports to advise the jury concerning the duties of the respective companies toward each other, with reference to stopping at the crossing in question, and was correct within the scope it assumed to cover. When read in connection with the preceding instructions bearing on the same subject, we do not believe it is subject to the objection made by appellant.

By said instruction No. 12 the jury was told in substance that, notwithstanding the fact that there was no statute in force in Indiana which required

8. appellant to have its cars equipped with air brakes, and to use the same in stopping its cars when switching the same within the corporate limits of the city of Vincennes, still, if they found from the evidence that at the time of the collision in which appellee received his alleged injuries appellant was so engaged, with an engine and cars so equipped, that it was proper in the practical conduct of such switching to use said air brakes to facilitate the stopping of its cars before they collided with the street car in which appellee was a passenger, but appel-

lant's servants in charge thereof failed to use such air brakes for such purpose, they could consider such failure, in connection with all the other evidence in the case, to determine the fact as to whether or not appellant exercised ordinary care and diligence to avoid the collision of the cars and the injury to appellee. Appellant contends that there was no law requiring it to equip its cars with air brakes and use the same to facilitate stopping while engaged in a switching operation, and hence the giving of such instruction was error. It may be conceded that there was no statute requiring appellant to so equip its cars and use the same for such purpose, but it does not follow that it was not appellant's duty to use the air brakes with which it is conceded such cars were equipped. Whether it was its duty so to do depended on whether such acts were reasonably necessary in the discharge of its duty to exercise ordinary care and diligence to avoid such collision and injury to appellee, and was a question for the determination of the jury. *Pennsylvania Co. v. Hensil* (1880), 70 Ind. 569, 36 Am. Rep. 188; *Evansville, etc., R. Co. v. Hoffman, supra*; *United States Cement Co. v. Cooper* (1909), 172 Ind. 599, 88 N. E. 69; *American Hominny Co. v. LaForge* (1915), 184 Ind. 600, 111 N. E. 8. The relevancy of such instruction becomes manifest when it is noted that the evidence discloses that the switch engine in question, on the occasion of the alleged collision and injury to appellee, was engaged in moving seven large refrigerator cars backward in the nighttime for a distance of over a mile on a track, a portion of which ran through a populous portion of a city, and passed over highways and at least one street car line, and that such engine and cars were equipped

with air brakes, ready for use when connected. It is further urged by appellant against said in-

9. struction, that it is in hopeless conflict with instructions Nos. 7, 8, and 10 given on its request, and hence confusing to the jury. By instructions Nos. 7 and 10 the jury was informed in substance that appellant owed no duty to equip its cars with air brakes, and have them connected and in use, merely in order to avoid injury to street cars or other vehicles which might be placed in peril at crossings through the negligence of persons in charge of them, or to avoid injury to persons who voluntarily and negligently put themselves in danger at such crossings. This was a correct statement, and not in conflict with said instruction No. 12. The conflict between

said instruction and instruction No. 8, given by
10. the court at the request of appellant, grows out of the fact that the latter instruction is erroneous in stating, as a matter of law: "That it is not negligence for a railroad company to fail to connect, use, and operate air or power brakes on such of its engines or cars, as are being handled in yard service, or by local trains performing switching service." Such failure may not have been unlawful, and therefore not negligence *per se*, but it may have been an act of negligence nevertheless, depending on existing conditions, and hence was a question for the jury. However, since said instruction No. 8 was given at the request of appellant, and was more favorable to it than the law warrants, any such conflict was harmless. Appellant also claims that said instruction No. 12 contains the same objectionable feature urged against instruction No. 10 given by the court on its own motion, but what we have said regarding the

alleged error in that instruction applies with equal force here. We therefore conclude that the giving of said instruction No. 12 was not error.

Appellant claims that the court erred in refusing to give instruction No. 9 tendered by it. It has been repeatedly held that a failure to properly pre-

11. sent an alleged error on appeal waives the same. *Duffy v. England* (1911), 176 Ind. 575, 96 N. E. 704; *Parker v. Boyle* (1912), 178 Ind.

12. 560, 99 N. E. 986. A proper presentation of such error required that appellant's brief should "contain under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them," as provided by clause 5 of Rule 22 governing the preparation of briefs. The only reference made by appellant in its propositions or points to the error in question is as follows: "The court erred in refusing to give instruction No. 9 requested by defendant, and set out ante p. 19." Such statement is not a compliance with said rule, and presents no question for our consideration. *Wellington v. Reynolds* (1911), 177 Ind. 49, 97 N. E. 155; *Wysor Land Co. v. Jones* (1899), 24 Ind. App. 451, 56 N. E. 46; *Hart v. State* (1913), 181 Ind. 23, 103 N. E. 846; *Inland Steel Co. v. Smith* (1906), 168 Ind. 245, 80 N. E. 538; *McMurrin v. Hannum* (1916), 185 Ind. 326, 113 N. E. 238. An omission to comply with

13. such rule cannot thereafter be cured by a discussion of the alleged error in the argument. *Ewbank's Manual* (2d ed.) §180a; *Pittsburgh, etc., R. Co. v. Lighthouse* (1906), 168 Ind. 438, 78 N. E. 1033; *Michael v. State* (1912), 178 Ind. 676, 99 N. E.

788; *Wolf v. Akin* (1913), 55 Ind. App. 589, 104 N. E. 308; *Moore v. Ohl* (1917), 65 Ind. App. 691, 116 N. E. 9.

Appellant predicates error on the action of the court in excluding certain evidence offered by it. It appears that one Dr. Lex was called as a witness for appellee, as to the nature and extent of the injuries for which he sought to recover damages, and was asked on cross-examination by appellant if he had not been indicted in Breckenridge county, Kentucky, for violation of the liquor laws of that state, and for violation of the law in selling cigarettes to minors. In his answers to such questions he denied that he had been so indicted. Appellant afterwards sought to impeach such witness by proving by one Claud Mercer that while he was the Commonwealth's attorney for said county he saw the witness Lex arraigned on several indictments or informations, and that he pleaded guilty and paid his fines, and by introducing in evidence certified copies of certain records of the court of said county, having criminal jurisdiction, showing that said witness was prosecuted on indictments and on informations in said county for the violation of the liquor laws, and for selling cigarettes to minors. On appellee's objections the court excluded such evidence, to which rulings appellant excepted. It is apparent from the evidence offered that appellant was seeking to impeach the witness on a collateral matter, involving his prosecution for one or more criminal offenses. As affecting appellant's right so to do, it is well settled in this state that while a court may, in its discretion, permit a witness to be interrogated as to specific extraneous offenses and conduct calculated to degrade him, and

Evansville, etc., R. Co. v. Hoffman—67 Ind. App. 571.

thus impair his credibility as a witness, the party propounding the interrogatory is bound by the answer the witness gives, and will not be permitted to introduce substantive evidence to contradict it. *City of South Bend v. Hardy* (1884), 98 Ind. 577, 49 Am. Rep. 792; *Dunn v. State* (1903), 162 Ind. 174, 70 N. E. 521; *Ročk v. State* (1916), 185 Ind. 51, 110 N. E. 212; *Johnson v. Samuels* (1916), 186 Ind. 56, 114 N. E. 977. It follows that the court did not err in excluding such evidence.

It is finally urged that the verdict is not sustained by sufficient evidence and is contrary to law, based on the ground that there is no evidence in the rec-

15. ord that any negligence of appellant contributed to cause appellee's injury, while the undisputed evidence shows that the negligence of the street car company was the sole proximate cause of such injury. We have carefully examined the evidence in this regard, but fail to find such a state of facts shown thereby as will warrant this court in sustaining appellant's contention, and thereby declaring, as a matter of law, that appellant was not guilty of any act of negligence which proximately contributed to appellee's injury. The rule is well settled that, where reasonable minds may differ upon the conclusions and inferences to be drawn from the evidence, then the question is one of fact for the court or jury trying the cause. Such a case is presented by the evidence here. *Indiana Union Traction Co. v. Love* (1913), 180 Ind. 442, 99 N. E. 1005; *Vincennes Traction Co. v. Curry*, *supra*.

We find no available error in the record. Judgment affirmed.

NOTE.—Reported in 118 N. E. 151. See under (4) 33 Cyc 1042; (5) 33 Cyc 977; (9) 33 Cyc 977; (10) 33 Cyc 1110; (16) 40 Cyc 2622; (17) 40 Cyc 2622.

WACKER' v. ESSEX ET AL.

[No. 9,542. Filed May 3, 1918.]

1. **CONTRACTS.—Building Contracts.—Performance.—Architect's Certificates.—Conclusiveness.**—An architect must act within the scope of his authority in order to bind the owner by certificates as to the amount due for labor and materials. p. 590.
2. **CONTRACTS.—Building Contracts.—Architect's Certificates.—Conclusiveness.**—Under a contract which provided that the contractor was to be paid in monthly payments, as the work progressed, eighty-five per cent. of the contract price, the remaining fifteen per cent. to be paid thirty days after the work had been "fully completed and accepted by the owner in writing," the architect's certificates as to the final amount due and as to "extras," each certificate reciting that it was not to be considered as an acceptance, but only as an expression of the architect's opinion, were not conclusive on the owner. p. 590.
3. **APPEAL.—Review.—Reservation of Grounds.**—Objections as to the exclusion of evidence not urged in the motion for new trial present no question for review. p. 591.
4. **CONTRACTS.—Building Contracts.—Waiver of Provision.—Question of Fact.**—Though the provision of a building contract requiring a written demand for an extension of time because of delay of the owner, etc., may be waived, whether there has been such a waiver is a question of fact. p. 593.
5. **APPEAL.—Review.—Questions of Fact.**—The decision of the trial court on a question of fact, if supported by some evidence, is conclusive on appeal. p. 593.
6. **APPEAL.—Briefs.—Contracts.—Evidence.—Admissibility.**—In a building contractor's action, there was no error in excluding evidence of contracts between the owner and other contractors for the construction of other parts of the building, where there was no showing that the appellant contractor's rights could have been affected by such contracts. p. 594.

From Marion Superior Court; *W. W. Thornton*, Judge.

Action by Herbert M. Woolen and another against S. Herbert Essex and others, in which Charles J. Wacker and others filed cross-complaints. From the judgment rendered, Wacker appeals. *Affirmed.*

Wacker v. Essex—67 Ind. App. 584.

Henley, Fenton & Joseph, Francis M. Springer and Henry Abrams, for appellant.

Remy & Berryhill, for appellee.

HOTTEL, J.—The facts which gave rise to the litigation in which the judgment was rendered from which this appeal is prosecuted are in substance as follows: On February 8, 1913, the appellees, S. Herbert Essex and Lenora Essex, hereinafter referred to as "E and E," obtained a ninety-nine year lease on ground fronting seventy-four feet on Meridian street and forty-two feet and eight inches on Louisiana street, in the city of Indianapolis. On the same day E and E subleased said ground to the Meridian Hotel Company, a corporation, for a period of twenty-five years from September 1, 1913, with a condition that a six-story hotel building would be erected thereon, ready for occupancy by August 21, 1913, for which said hotel company agreed to pay a rental of \$1,000 a month. Charles E. Bacon, an architect of Indianapolis, was employed by E and E to draw the plans and specifications and superintend the construction of said building. No general contract was made or let by E and E for the erection of said hotel, but they contracted with various persons, firms and corporations for the material and work that entered into its construction.

The first of these contracts was one between E and E and this appellant, Charles Wacker, purporting to have been made April 15, 1913, for the furnishing of all the material and labor for the erection and construction of all the concrete work, both plain and reinforced, required in the erection of said building. Afterwards other contracts were let for the furnish-

ing of material and labor necessary in the construction of said building, which, for the purposes of this appeal, need not be set out.

It is sufficient to say that most of said contractors filed notices of mechanics' liens on said building for the respective balances claimed to be due them for labor and material furnished and used therein under their respective contracts made with E and E. The Security Trust Company of Indianapolis, trustee, held a first and second mortgage on the ninety-nine year leasehold of E and E for approximately \$80,000.

The building was not ready for occupancy until in January, 1914, and E and E's rentals did not begin until February 1, 1914. On March 2, 1914, Mr. Bacon, the architect, gave to appellant Wacker a final certificate for \$2,275.20, and on the same day issued another certificate for \$608.30 for extras. These certificates were presented to appellee Herbert Essex for payment, and he refused to pay them.

Appellant also filed notice of a mechanic's lien on said building, and in a proceeding instituted by Herbert M. Woolen and Harry C. Callon, partners, he and other lienholders were made defendants. Cross-complaints were filed by such lienholders, and these cases drifted along until there was an application for a receiver for the hotel property. By agreement of the parties, the Security Trust Company agreed to put up an additional \$10,000 to pay judgments and cover the outstanding claims, and the liens on said real estate were transferred to said fund. In said proceedings all said claimants and lienholders have been compromised and settled with, except appellant and the appellee the D. V. Reedy Elevator Company.

The appellant, by way of cross-complaint in said proceedings, sought to recover against E and E on his said contract the amount due as shown by the two certificates above referred to as issued to him by said architect, and also a further item of \$75 for water rent paid by him for water furnished in the erection of said building. He also sought to foreclose a mechanic's lien.

This cross-complaint was answered by a general denial and by three affirmative paragraphs. The second paragraph, designated a set-off, sets out the terms of the contract with reference to the time for the completing of said work, and alleges a failure on appellant's part to so complete it and damages resulting therefrom, viz., damages resulting from loss of rental for sixty-two days, aggregating \$2,066.46. This paragraph also alleges that E and E, on account of such delay, were required to pay said hotel company, as damages resulting to said company from 142 days' delay in the completion of said work, \$1,600, and alleges that three-sevenths of said delay was caused by appellant, and that he should pay appellees as damages the further sum of \$685, making a total of \$2,751.46 asked in said paragraph by way of set-off.

The third paragraph sets up certain defects in the work and material furnished by appellant, and asks, on account thereof, \$150 damages by way of set-off.

The fourth paragraph is designated a counter-claim, and it sets out in detail wherein said work was not done in accord with the plans and specifications and wherein it is faulty and defective, and alleges the amount of the damages resulting from each item of such faulty and defective work; that the total dam-

age resulting therefrom is \$3,350, and asks for judgment accordingly.

To these answers the appellant filed a reply in general denial and a special reply to said second paragraph of answer, in which he alleges that the delay in the completion of his part of said building was due to the acts, orders and conduct, particularly set out, of E and E and the architect, and by bad weather and strikes of his employes, over which he had no control and for which he was not responsible; that he did his work as fast as he was permitted to do it by E and E. It is also alleged that E and E waived the provisions of article 7 of said contract, hereinafter set out, and assured appellant that the several delays set out in said reply, and causes as therein set out, would in each instance be added to the original time given for the completion of said work, without any written request for such extension.

Upon these issues a trial by the court resulted in a general finding in favor of appellant on his cross-complaint against S. Herbert Essex in the sum of \$2,774.70, and a finding for said Essex on the counter-claim of E and E in the sum of \$4,210.57. The court further found for Lenora Essex on appellant's cross-complaint, and that she take nothing by her counter-claim. Upon this finding the court rendered judgment that S. Herbert Essex recover of appellant on his counter-claim \$1,435.87 and his costs, and that Lenora Essex recover her costs.

A motion for new trial filed by appellant was overruled. This ruling is assigned as error, and in his brief, under the heading "Errors relied upon for reversal," the appellant says that he relies on his first assignment, viz.: "The court erred in overruling ap-

pellant's motion for a new trial." This statement of the error relied on is immediately followed by a sub-head as follows: "(a) The decision of the court is contrary to law."

This statement is followed with the heading "Propositions and Authorities," under which eight propositions are stated.

The motion for new trial contains twenty-five separate grounds or reasons, but neither of appellant's propositions is specifically addressed to either of said grounds, except as above indicated.

It is insisted by appellees, in effect, that appellant, by said brief, has eliminated all grounds of his motion for new trial, except that challenging the decision of the trial court as being contrary to law, and that his propositions of law, if they can be held to apply to either of the grounds of such motion, should at least be limited to the one ground.

Appellant's first proposition is to the effect that appellant introduced in evidence the architect's final certificate, showing that there was due him on his contract the sum of \$2,275.20, and an additional certificate showing that there was due him for extra work the sum of \$608.30; that there was no evidence showing that such certificates were issued by mistake or through fraud or collusion; that, in the absence of such evidence, such certificates were binding on appellees, and hence that the court should have rendered judgment for their full amount, plus interest thereon from the date of their presentation for payment.

It is stated by appellant, in his reply brief, that this proposition is addressed to that ground of his motion

for new trial which challenges the decision of the trial court as being contrary to law.

It should be observed in this connection that the finding is general, and under the issues the court may have found for appellant in the full amount represented by said certificates and yet have found for appellees in an amount sufficient to justify the judgment rendered.

Assuming, however, without so holding, that the question which appellant suggests in his proposition *supra* is properly presented by his brief, it

1. would avail him nothing. Whether the certificates of said architect were conclusive on appellees as to the acceptance of said work and the amount due thereon depends upon the terms of such certificates and the authority under which they were issued. To bind the owner of the property in such a case, the architect must act within the scope of his authority. *Eigemann v. Board, etc.* (1882), 82 Ind. 413; *Niemeyer v. Woods* (1903), 175 N. Y. 492, 67 N. E. 1086; 5 C. J. 256.

The certificates in this case each contain the following provision:

- “Notice: This certificate is an expression of the architect’s opinion and shall at no
2. time be considered as a legal obligation on his part; neither shall same be considered as an acceptance of any work done or materials furnished.”

In the contract between appellant and appellees, Bacon is named as the architect, appellant as contractor, and appellee Bert Essex as owner. The plans and specifications are a part of this contract, and specification No. 24 provides:

“Payments will be made on monthly estimates made by the architect, 85 per cent. of the estimate to be paid and the other 15 per cent. to be payable 30 days after the work is fully completed *and accepted by the owner in writing.*” (Our italics.)

It follows that said certificates were not conclusive upon appellees, and when we look to the evidence we find that appellant admitted an error in said certificates of \$18. There was also evidence, which seems not to have been disputed, that the first two and the last two items enumerated among the extras were not in fact extras. This admitted error and disputed extras aggregate \$108.80, and when subtracted from the amount of said certificates a balance of \$2,774.70 remains, which is the amount shown by the general finding to have been allowed appellant on his cross-complaint. It follows that the legal principle involved in appellant's first proposition can avail him nothing under the facts of this case.

Appellant's second proposition is to the following effect, viz.: Appellant's work was the first work in the construction of said building. Certain rules

3. of the Indianapolis Water Company require that a water permit for the use of all water to be used in all the work on a building shall be obtained and paid for in advance. Water could not be obtained from any other source, and appellant secured said permit from said water company and paid for it. All water paid for in excess of that used by appellant inured to the benefit of E and E; that this excess amounted to \$75. While this item is not included in the extras certified to by the architect, appellant, under the issues, was entitled to an allowance therefor. In

this proposition, it is insisted that: "The court erred in excluding evidence offered to sustain said facts, viz., the receipt of payment and permit for the use of water, * * * and the rules 1 and 2 of the Indianapolis Water Company fixing conditions upon which permits will be issued * * *."

It is sufficient to say, in answer to this proposition, that: The motion for new trial contains no ground predicated upon the exclusion of either of the items of evidence indicated.

We might add that specification No. 14 of the plans and specifications, made part of the contract upon which appellant's action is based, expressly provides that "the contractor shall furnish the water for the execution of his work," so if any one was obligated to pay appellant for such excess water, it was the other contractors, who used the water and obtained the benefit of his permit.

Proposition 3 is a general proposition to the effect that the provisions of a contract requiring alterations, changes and extra work to be made on written orders, may be waived, etc. Nothing is presented by this proposition. The legal principle involved therein was doubtless recognized by the trial court, because, as we have already indicated, the general finding of the court is such as to indicate that most of the items charged against appellee in appellant's cross-complaint were allowed.

Appellant's fourth proposition is to the effect that the court erred in giving judgment against him for delay growing out of the acts and omissions of appellees.

Again assuming, without so holding, that the question suggested is presented by appellant's brief, it

must be decided adverse to his contention. The contract here involved is what is designated as "The Uniform Contract." Article 7 thereof provides, in part, as follows:

"Should the contractor be delayed in the prosecution or completion of the work by the act, neglect or default of the owner, of the architect, or of any other contractor employed by the owner upon the work * * * or by combined action of workmen in no wise caused by or resulting from default or collusion on the part of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid which extended period shall be determined and fixed by the architect; but no allowance shall be made unless a claim therefor is presented in writing to the architect within forty-eight hours of the occurrence of such delay."

These provisions, so far as material to the question suggested, are substantially the same as were involved in the case of *Wm. P. Jungclaus Co. v. Ratti*, ante 84, 118 N. E. 966. What is there said is pertinent and applicable here, and, in effect, disposes of appellant's contention.

It is true, as appellant contends, that there may be a waiver of the provision of such contract requiring a written demand for an extension of time resulting in delay, but whether there was such a waiver is a question of fact to be determined from the evidence in the case, and the decision of the trial court on such question of fact, as

in all questions of fact, is conclusive upon this court where it has any evidence to support it.

Appellant's proposition 5 is to the effect that the court erred in *treating* as an element of appellees' damages a certain sum paid by them to the Meridian Hotel Company based upon that company's loss resulting from the delay in giving it possession of said building. Assuming, without so holding, that such item was not a proper element of damage, this court cannot know what the trial court *treated* as damages. If it was appellant's purpose to challenge the admission of evidence of this character, his brief wholly fails to present such question.

The grounds of appellant's motion for new trial from 9 to 21, inclusive, each respectively challenges the action of the trial court in excluding a particular contract entered into between appellees and some one of the various other contractors who aided in the construction of said building.

Appellant's sixth proposition is to the effect that the court erred "in excluding evidence of subsequent contracts made by appellee Essex with other contractors, covering the other parts of the work of the erection of the building."

We assume that this proposition is intended to challenge the several separate rulings of the trial court covered by said grounds 9 to 21 of appel-

6. lant's motion for new trial. Without holding that the question attempted to be presented by such separate grounds of the motion for new trial are properly presented by appellant's brief, we think it safe to say that no error resulted from the exclusion of said evidence.

Appellant's brief does not indicate wherein his

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rights under his contract could have been affected by the contracts entered into between appellees and such other contractors.

What we have said in our disposition of the above propositions, in effect, disposes of those remaining, and we deem it unnecessary to give them separate consideration.

Appellant's brief presents no reversible error, and our examination of the record and evidence convinces us that he had a fair trial. The judgment below is therefore affirmed.

NOTE.—Reported in 119 N. E. 466. See under (1) 5 C. J. 256, 9 C. J. 775; (2) 9 C. J. 775; (4) 9 C. J. 888. Conclusiveness of architect's certificate, note 56 Am. St. 314. Conclusiveness of an architect's decision under working contract, 10 Ann. Cas. 575; Ann. Cas. 1913A 180.

LEASE v. LEASE.

[No. 9,636. Filed May 3, 1918.]

APPEAL.—*Dismissal*.—An appeal in a divorce proceeding in which the only error assigned challenges the jurisdiction of the trial court because of the absence of the affidavit of residence, as required by §1066 Burns 1914, §1081 R. S. 1881, will be dismissed where the record, as corrected by writ of *certiorari* on the appellee's petition, shows that the affidavit was properly filed with the complaint.

From Hamilton Circuit Court; *Ernest E. Cloe*, Judge.

Proceeding for divorce by Ada Lease against Schuyler M. Lease. From a judgment for the plaintiff, the defendant appeals. *Appeal dismissed*.

Lease v. Lease—67 Ind. App. 585.

M. G. Christian, Ira W. Christian and Ralph H. Waltz, for appellant.

Gentry & Campbell, for appellee.

HOTTEL, J.—This is an appeal from a judgment and decree in appellee's favor granting her a divorce, alimony, and the care and custody of the children therein named.

The error assigned is: "The court had no jurisdiction of the subject-matter of the action."

It appears from appellant's brief that said assigned error is predicated upon the fact that the affidavit of residence required by §1066 Burns 1914, §1031 R. S. 1881, was not filed with plaintiff's complaint. The transcript originally filed herein shows no affidavit accompanying said complaint, but, since the filing of said transcript and appellant's briefs herein, appellee has filed a petition for a writ of *certiorari*, which has been granted, and the transcript, as now supplemented by the return to such writ, shows that the complaint was in fact accompanied by an affidavit of residence. As the only question presented by appellant in his brief is that challenging the jurisdiction of the trial court because of the absence of said affidavit, the correction of the record as indicated leaves no further question presented for our determination.

The appeal is therefore dismissed.

NOTE.—Reported in 119 N. E. 480.

FORT WAYNE AND NORTHERN INDIANA TRACTION
COMPANY ET AL. v. PARISH.

[No. 9,613. Filed May 3, 1918.]

1. CARRIERS.—*Street Railroads.—Passengers.—Care Required.*—A street railway company owes a passenger on one of its cars the duty of exercising the highest degree of care practicable. p. 600.
2. CARRIERS.—*Street Railways.—Negligence.—Concurring Causes.*—A complaint alleging that the defendant street railway company stopped its car within the intersection of a street, negligently permitting it to remain on the crossing, which was not a regular stopping place, and that, while the car was standing in such position, a runaway team collided with it, injuring the plaintiff, who was a passenger on the car, that the owner of the team, another defendant, knowingly allowed a spirited team to be hitched to the wagon, that the tongue of the wagon was so defective that it was certain to break and cause the wagon to run against the team, and that the tongue did break causing the team to run away, was sufficient to charge each of the defendants with concurring negligence. pp. 600, 601.
3. NEGLIGENCE.—*Concurring Causes.—Liability.*—Where an injury results from two concurring causes, a party at fault for one of such causes is liable if the injury would not have resulted in the absence of such fault. p. 601.
4. CARRIERS.—*Duty to Passengers.—Degree of Care.—Sudden Peril.—Jury Question.*—Where the motorman of a street car driving slowly upon a crossing saw a runaway team suddenly bearing down upon the car, he is responsible only for such degree of care that an ordinarily prudent person would have exercised under the circumstances; and whether the motorman was guilty of negligence in stopping the car on the crossing, a passenger having been injured by the collision, was a question of fact for the jury to determine under proper instructions. p. 604.
5. CARRIERS.—*Collisions.—Negligence.—Sufficiency of Evidence.*—In an action for injuries sustained by a passenger in a collision between a street car and a runaway team, the evidence is reviewed and held sufficient to sustain a verdict against the carrier and the owner of the team for concurrent negligence resulting in the injury. p. 604.

From Allen Circuit Court; J. W. Eggeman, Judge.

Fort Wayne, etc., Traction Co. v. Parish—67 Ind. App. 597.

Action by Daisy D. Parish against the Fort Wayne and Northern Indiana Traction Company and another. From a judgment for the plaintiff, the defendants appeal. *Affirmed.*

Barrett, Morris & Hoffman and *Robert B. Dreibebiss*, for appellants.

John H. Aiken, for appellee.

FELT, J.—This suit was brought by appellee against appellants to recover damages for personal injuries alleged to have resulted from the concurring negligence of the appellants. The complaint in one paragraph was answered by each defendant by a general denial. A trial by jury resulted in a verdict against both defendants for \$500. Each of the appellants filed a motion for a new trial, which was overruled, and judgment was rendered on the verdict.

Appellant the Fort Wayne and Northern Indiana Traction Company has assigned as separate error the overruling of its demurrer to the complaint and the overruling of its separate motion for a new trial. Appellant Wyss has assigned as error that the court erred in overruling his motion for a new trial.

The substance of the averments of the complaint is as follows: The appellant Fort Wayne and Northern Indiana Traction Company owns and operates a street railway system in the city of Fort Wayne, Indiana. On March 15, 1915, appellee became a passenger on one of said company's cars, running on Calhoun street, and paid her fare to be carried from Pontiac street north to the Lake Shore and Michigan Southern depot in said city. Appellant Wyss is a farmer and owned a team of spirited horses, which on said day were hitched to a wagon loaded with

grain and were driven by an employe of said Wyss over and along certain streets in said city. The tongue of the wagon aforesaid was out of repair and broken, in this: that the wood and iron attached near the end of the tongue, over which the neckyoke was attached, had previously become cracked and broken to such an extent that it was certain that in using it the end of the tongue would break off and cause the wagon to run upon and against said horses, all of which was known to said Wyss before he allowed the same to be so used as aforesaid. When the car on which appellee was a passenger as aforesaid arrived at the crossing of DeWald and Calhoun streets, it was carelessly and negligently stopped by said company's motorman, in charge of the same, within the intersection of said streets, and negligently permitted to remain therein. The place where the car was so stopped was not the proper place for taking on or discharging passengers, and no passengers desired to board or leave the car at said place. Appellee was seated on the west side of the car as it ran north, and there was an iron railing in front of her. The employe of appellant Wyss was at the time driving said team west on DeWald street, approaching Calhoun street, when the said defective tongue suddenly broke and the wagon ran upon said horses, frightened them, and caused them to run and the broken tongue to plow along upon the surface of the street. The team and wagon ran into said street car so carelessly and negligently stopped in said street intersection, broke the window and side of the car, and the broken wagon tongue extended into and across said car. By force of the collision appellee was thrown violently against said iron railing and against the side of the car, whereby

her right side and right arm were severely bruised, and she was permanently injured and caused to suffer great pain, and to expend more than \$100 for hospital and medical treatment in an effort to cure the injuries and relieve the pain so caused as aforesaid. Prayer for damages in the sum of \$5,000.

The memorandum accompanying the demurrer states that: (1) The averments show that the negligence of the company's codefendant Wyss was the sole proximate cause of the injury suffered by the plaintiff. (2) The street car company had no connection with or control over its codefendant. (3) The averments show no negligence of the company which proximately caused plaintiff's alleged injuries. (4) The averments show plaintiff's injuries were due to an unavoidable accident entirely beyond the control of the company, and which could not reasonably have been anticipated by it.

The facts show that appellee was a passenger on one of the cars of the traction company at the time she received the injuries for which she sues.

1. The company therefore owed her the duty of exercising the highest practicable care for her safety. *Terre Haute, etc., R. Co. v. Sheeks* (1900), 155 Ind. 74, 94, 56 N. E. 434; *Indianapolis St. R. Co. v. Schmidt* (1904), 163 Ind. 360, 364, 71 N. E. 201.

The general averments that the traction company negligently stopped its car within the intersection of the streets where the accident occurred, and

2. negligently permitted it to remain in the space occupied by the crossing of the streets, which was not the proper place to stop the car to receive and discharge passengers, and that while the car was so standing out in the street as aforesaid the team ran

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into it and caused appellee's injuries, as alleged, show a violation of the duty that the traction company owed appellee which contributed to her alleged injury, and are clearly sufficient as a matter of pleading to show a violation of the duty which the company owed to appellee as a passenger. *Belt R., etc., Co. v. McClain* (1914), 58 Ind. App. 171, 175, 106 N. E. 742; *Tippecanoe Loan, etc., Co. v. Cleveland, etc., R. Co.* (1914), 57 Ind. App. 644, 656, 104 N. E. 866, 106 N. E. 739; *Cleveland, etc., R. Co. v. Colson* (1912), 51 Ind. App. 225, 227, 99 N. E. 433.

Where two causes concur in producing an injury, the party at fault for one of such causes will be held liable if the injury would not have occurred in

3. the absence of such fault. The averments of the complaint aforesaid show that the traction company negligently held its car on the street
2. crossing, and that appellee's injury would not have been received but for the fault of the company in so doing. These averments sufficiently show two causes concurring in producing the alleged injury, and that the alleged negligence of the traction company was a contributing, proximate cause of such injury. When fairly construed, the complaint states a cause of action against both defendants, and the court did not err in overruling the demurrer thereto. *Terre Haute, etc., Traction Co. v. Hunter* (1916), 62 Ind. App. 399, 417, 111 N. E. 344, 349; *Lake Erie, etc., R. Co. v. Charman* (1903), 161 Ind. 95, 103, 67 N. E. 923; *Southern R. Co. v. Adams* (1912), 52 Ind. App. 322, 328, 100 N. E. 773; *Cleveland, etc., R. Co. v. Clark* (1912), 51 Ind. App. 392, 401, 404, 97 N. E. 822.

The sufficiency of the evidence to support the verdict is the only question duly presented under the mo-

tions for a new trial. Under their respective motions each appellant contends that the other is liable for the injury to appellee. The evidence tends to show that as the street car, on which appellee was a passenger, approached DeWald street, which crosses Calhoun street at right angles, the team of appellant Wyss was running west on DeWald street, and when the street car entered upon the crossing the team was about one-half square, or more than 100 feet, east of the car tracks; that the street car was moving slowly and the team was clearly visible as it approached, and was seen by appellee and other passengers when half a square from the car; that after the car reached the crossing the motorman turned around and looked in the direction of the approaching team. The motorman testified that he saw the horses galloping toward the tracks, stopped his car a few seconds before they ran into it, and did not think he could have cleared the crossing before the team reached the tracks. The driver of the team testified in substance that the tongue broke and let the wagon run against the horses; that it was down grade toward the car tracks; that he saw the car and thought it would pass the crossing before the team reached it; that it would have passed the crossing before the team reached it if the car had continued to move as it was moving when it entered the street crossing; that the car moved so far across the street that the team could not pass north of it. The testimony of different witnesses varied as to the position of the car; some indicating that the front of the car was about four feet north of the south curb of DeWald street, and others that it was almost even with the north curb when it stopped and when the team ran into it. The street

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was twenty feet wide between curbs. The evidence also tended to show that the team ran down the center of the street, turned a little to the south just before striking the car, and was within three or four feet of the south curb when it struck the car; that the broken tongue of the wagon entered the side of the car, broke the second window from the front end, and ran up into the top of the car; that the jar was very severe; that the owner of the team had been informed that the tongue that broke was defective and liable to break before the day on which the accident occurred.

The court submitted the question of the alleged negligence of each of the defendants to the jury to be determined from the evidence, and in substance informed the jury that the burden was on appellee to prove the material averments of her complaint; that to be entitled to a verdict against either defendant she must prove by a fair preponderance of the evidence that the alleged negligence of such defendant proximately caused or contributed to her said injuries; that if the preponderance of the evidence showed the alleged negligence of one of the defendants to have caused appellee's injury, and did not prove the alleged negligence of such other defendant, then she could recover only against the one whose negligence was so proved, and could not recover against the other defendant; that in case the preponderance of the evidence showed that the alleged negligence of each of the defendants proximately contributed to appellee's injuries, she could recover against both defendants; that she could not recover if she was guilty of any negligence which proximately contributed to her injuries, nor if her injuries were the result of a pure accident.

The facts of the case as related to the motorman in charge of the car on which appellee was a passenger invoke the application of the rule that when

4. a person is confronted with sudden peril, and must act in the emergency occasioned thereby, he is not held to the same degree of care that he would otherwise be required to exercise in the absence of emergency, and is only responsible for such degree of care as an ordinarily prudent person would have exercised under like circumstances and conditions. But even under this rule it is still a question of fact to be determined from the evidence by the jury whether he was or was not guilty of negligence under the circumstances shown. *City of Indianapolis v. Pell* (1916), 62 Ind. App. 191, 195, 111 N. E. 22. In the case at bar the traction company tendered instruction No. 3, which gave it the full benefit of this doctrine, and the court gave the instruction to the jury as tendered.

The evidence tends to sustain all the material averments of the complaint and warranted the verdict of the jury. The case seems to have been fairly

5. tried on its merits, and no cause for reversal of the judgment has been pointed out. *Baltimore, etc., R. Co. v. Kleespies* (1906), 39 Ind. App. 151, 164, 76 N. E. 1015, 78 N. E. 252; *Moran v. Leslie* (1903), 33 Ind. App. 80, 82, 70 N. E. 162; *Cleveland, etc., R. Co. v. Clark, supra.*

Judgment affirmed.

NOTE.—Reported in 119 N. E. 488. Carrier's duty to a passenger in respect to care, 118 Am. St. 465. See under (1) 10 C. J. 858; (2) 10 C. J. 1001; (3) 29 Cyc 532.

BEARD v. FENTON ET AL.

[No. 10,152. Filed May 14, 1918.]

APPEAL.—Dismissal.—Bill of Exceptions.—Failure to File in Time.

—Where the ruling on a motion for new trial, based solely on the ground that the verdict is not sustained by sufficient evidence and is contrary to law, is the only error assigned, and the record shows that the bill of exceptions containing the evidence was not filed within the time fixed by the court, the appeal must be dismissed.

From Franklin Circuit Court; *Raymond S. Springer*, Judge.

Action by Mary E. Fenton against John E. Beard and Cora Sheard. From a judgment for the plaintiff, Beard appeals. *Affirmed.*

Mars R. Alexander and *George R. Foster*, for appellant.

M. P. Hubbard, for appellee.

IBACH, C. J.—This is an appeal from a judgment on a promissory note executed by appellant and appellee Sheard. Appellee Mary E. Fenton died after the bringing of this appeal, and Harry Fenton was on motion substituted in her stead. Said appellee now moves this court to dismiss the appeal herein upon grounds, among others, that the bill of exceptions containing the evidence was not filed within the time fixed by the court.

The overruling of appellant's motion for a new trial, alleging as grounds therefor that the verdict of the jury is not sustained by sufficient evidence and is contrary to law, is the only error assigned for reversal. A consideration of such questions would require an examination of the evidence.

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An examination of the record shows that appellant's motion for a new trial was overruled on April 24, 1917, and that he was then given ninety days' time in which to prepare and file his bills of exceptions; that the bill of exceptions containing the evidence was not filed or presented to the judge for his approval until September 13, 1917. The evidence is not before us, and, as the motion for a new trial presents no other question, the appeal must be dismissed. *Huntingburg Bank v. Morgenroth* (1916), 64 Ind. App. 315, 115 N. E. 798.

Appeal dismissed.

NOTE.—Reported in 119 N. E. 495. See 4 C. J. 570.

JOHNSON, INSURANCE COMMISSIONER, v. SCHREPFERMAN.

[No. 9,602. Filed May 14, 1918.]

1. **APPEAL.—Briefs.—Questions Presented.**—Where the principal questions sought to be presented may be ascertained by the consideration of the appellant's and the appellee's briefs together, such questions so ascertainable will be considered, though the appellant's briefs are subject to criticism. p. 607.
2. **BROKERS.—Definition.**—A broker is a negotiator between other parties, and as such does not act in his own name. p. 609.
3. **BROKERS.—Character of Acts.—Proof of Relation.—Inference.**—The character of a broker's relation to a given transaction may be proved like any other fact, either by direct evidence or by the proof of facts which warrant an inference as to such relation. p. 610.
4. **INSURANCE.—Agent's Authority.**—In the absence of a special contract to the contrary, a broker who procures insurance which is accepted and issued by the company is the agent of the company, and his acts and representations within the scope of his authority are binding on the company. p. 610.

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5. EVIDENCE.—*Res Gestae*.—*Statements of Agent*.—In an action by an insurance commissioner for recovery of a delinquent premium on a policy procured by the defendant through a broker, acts and statements of the broker in reference to the procuring of the policy, the adjusting of the premium and the canceling of the policy, which were within the scope of the broker's authority, are admissible in evidence as part of the *res gestae*. p. 611.

From Clay Circuit Court; *John M. Rawley*, Judge.

Action by Charles Johnson, as Insurance Commissioner for the Commonwealth of Pennsylvania, against Nicholas Schrepferman. From a judgment for the defendant, the plaintiff appeals. *Affirmed*.

B. C. Craig, for appellant.

McGregor, Knight & Müller and *Edward H. Knight*, for appellee.

FELT, J.—Appellant brought suit against appellee to collect an alleged unpaid premium for insurance. The complaint in one paragraph was answered by a general denial. The case was tried by the court without a jury, and the finding and judgment were for the defendant. Appellant filed a motion for a new trial, which was overruled, and this appeal prayed and granted. The only error assigned is the overruling of the motion for a new trial.

Appellee earnestly contends that no questions are duly presented by appellant's briefs under the rules of this court. The briefs are justly subject to criticism, but, considering the briefs of both

1. appellant and appellee together, we are able to ascertain the principal questions sought to be presented, and shall consider only such questions as may be so ascertained.

It appears without controversy that on May 18, 1914, the Employers' Indemnity Company, an insur-

ance company of the State of Pennsylvania, was by due order of court in that state dissolved, and appellant was placed in charge of its business and assets for the purpose of liquidation; that on September 25, 1912, said company issued to appellee a policy of industrial insurance to protect him from loss on account of damages sustained by reason of injuries to his employes in certain coal mines operated by him in Clay county, Indiana; that in pursuance of the provisions of the policy the company canceled the same as of the date of December 1, 1912; that the premium for said policy was not paid by appellee, and appellant claims that there is due from him on that account the sum of \$174.07.

Over appellant's objection the court permitted witnesses to testify to certain statements made by Mr. Wolf to appellee, which tended to prove that appellee was not required to pay the premium on the policy in question, and that, in order to hold his business, other interested parties had arranged temporarily for his insurance until they could write his insurance in a company they were organizing.

The gist of appellant's contention is that there is no evidence, other than the statements of Wolf, himself, which tend to prove that he was the agent of the Employers' Indemnity Company; that the authority of an agent to represent his alleged principal cannot be proved by the statements of the agent. The latter proposition is not controverted.

There was evidence tending to show that appellee had carried such insurance in another company which had gone out of business, and that certain parties were engaged in organizing a new company with a view of carrying insurance formerly carried by such other

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company, including appellee's business; that, to hold such insurance, the aforesaid parties undertook to provide insurance for appellee without cost to him in other companies, including the Employers' Liability Company, until such new company was organized and authorized to do business. There was evidence, other than the statements of Wolf, to show that Wolf acted as an insurance broker; that the policy in question was procured by him, and that no representative or agent of the company had anything to do with its procurement other than Mr. Wolf and his assistants; that he delivered the policy to appellee, procured from him certain statements in regard to his pay roll, required by the Employers' Indemnity Company, delivered the same to the company, and later on arranged for the cancellation of the policy in accordance with the original plan when the policy was issued by the company and delivered to appellee by Mr. Wolf as aforesaid. Furthermore, appellant states in his brief that: "Arthur Wolf was an insurance broker * * * engaged in the business of securing insurance for clients."

Appellee contends that the evidence fully authorized the inference that Mr. Wolf acted as an insurance broker and as such procured the policy from the company; that acting in that capacity he was the agent of the company in the transaction with appellee relative to the policy and premium in controversy; also that the facts show a ratification of the agency of Wolf by the insurance company.

A broker is a negotiator between other parties, and does not act in his own name. The character of his relation to a given transaction, when not admitted, may be proved like any other fact, by either direct and positive evidence, or may be

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inferred from proved facts and circumstances

3. which warrant such inference. *Barnett v. Gluting* (1891), 3 Ind. App. 415, 420, 29 N. E. 154, 927; *Haas v. Ruston* (1895), 14 Ind. App. 8, 17, 42 N. E. 298, 56 Am. St. 288; 1 Words and Phrases 878; *Over v. Schiffing* (1885), 102 Ind. 191, 196, 26 N. E. 91; *Wagner v. McCool* (1912), 52 Ind. App. 124, 135, 100 N. E. 395. The evidence warrants the inference that Mr. Wolf acted as a broker in procuring the insurance from the company represented by appellant, for which the premium in controversy is alleged to be due.

The law is settled in Indiana that, in the absence of a special agreement or arrangement to the contrary,

4. a broker who procures insurance which is accepted and issued by the insurance company is the agent of such company, and may bind it by his acts and representations within the scope of his authority. Insurance brokers so acting are the agents of such companies for the purpose of delivering policies procured by them and in collecting or adjusting the premiums therefor. *Indiana Ins. Co. v. Hartwell* (1890), 123 Ind. 177, 191, 24 N. E. 100; *Thompson v. Michigan Mut. Life Ins. Co.* (1914), 56 Ind. App. 502, 510, 105 N. E. 780; *Western Ins. Co. v. Ashby* (1913), 53 Ind. App. 518, 523, 102 N. E. 45; *Insurance Company, etc. v. Indiana Reduction Co.* (1917), 65 Ind. App. 330, 117 N. E. 273; *Continental Ins. Co. v. Bair* (1917), 65 Ind. App. 502, 114 N. E. 763, 116 N. E. 752; *Globe, etc., Ins. Co. v. Indiana Reduction Co.* (1916), 62 Ind. App. 528, 113 N. E. 425.

The facts tend to sustain the finding, which includes the proposition that in procuring the insur-

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ance, adjusting the premium, and canceling the policy, Mr. Wolf was the agent of the company. Such being the case, his acts and statements relating to the transactions aforesaid are a part of the *res gestae* thereof and binding on the insurance company.

Appellant's contention goes to the admissibility of the evidence aforesaid, and it is not contended that if such evidence was properly received it does not tend to sustain the decision of the trial court.

The evidence also tends to show that no demand was made on appellee for payment of the premium while the company was doing business as a going concern, and that the first demand made on him therefor was made by a representative of appellant about two years after the policy was issued.

The case seems to have been fairly tried on its merits. No intervening error harmful to appellant has been pointed out. Judgment affirmed.

NOTE.—Reported in 119 N. E. 494. See under (2) 9 C. J. 508; (3) 9 C. J. 553; (4) 22 Cyc 1428, 1429; (5) 16 Cyc 1242.

KOKOMO TRUST COMPANY v. HILLER.

[No. 9,302. Filed May 29, 1917. Rehearing denied January 9, 1918.
Transfer denied May 15, 1918.]

1. DEEDS.—*Wills.—Construction.—Vesting of Interest.*—An instrument having all the formalities of a deed will be construed as such, and not as a will, where it appears therefrom that the maker intended to convey any interest whatever to vest on its execution. p. 618.
2. DEEDS.—*Delivery Through Third Person.—Effect.*—Where a deed is delivered through the instrumentality of a third person, the

title conveyed relates back to its execution completed by delivery to the grantee. p. 620.

3. **DEEDS.—Wills.—Construction.—Reservation of Life Estate.**—A recital reserving to the grantor, in an instrument in the form of a deed, the possession and control of lands during his lifetime amounts to a reservation of a life estate, and does not characterize the instrument as testamentary. p. 620.
4. **DEEDS.—Construction.—Reservation of Life Estate.—Defeasible Fee.**—An instrument in the form of a deed, which, after reserving a life estate to the grantor, reserved to the grantor the right to sell and convey the land during his lifetime, and provided that at his death the conveyance should be in full force and effect if he should die seized of the land, granted a present estate in fee, subject to a life estate, defeasible by reason of the reserved power, but which ripened into an indefeasible fee by the nonexercise of the power. p. 622.
5. **DEEDS.—Delivery Through Third Person.—Intent.**—Facts showing that the grantor, after signing and acknowledging deeds reserving a life estate, handed them to his attorney, who drew them as directed by the grantor, and instructed the attorney to keep them in his safe for the grantees and to have them recorded and delivered to them immediately upon the grantor's death, expressing a desire at the time that the grantees be informed concerning the deeds, which instructions were fully carried out, were sufficient to show that the grantor intended a delivery of the deeds. pp. 624, 630.
6. **DEEDS.—Delivery.—Intention.**—The grantor's intention is the controlling element in determining the question of the delivery of a deed, and such intention may be manifested either by acts or by words. p. 625.
7. **DEEDS.—Delivery to Third Person.—Reservation.—Effect in Determining Intention.**—Where a grantor executed deeds reserving a life estate and handed them to a third party, with instructions to keep them until the grantor's death and then to have them recorded and delivered to the grantees, reserving no control over the deeds, a reservation in each of the deeds of a right to sell and convey the lands was not part of the instructions to the third party, but the reservation and the instructions were distinct propositions, the former dealing with the quantity of estate conveyed and the latter with the disposition of instruments conveying such quantity. p. 627.
8. **DEEDS.—Delivery.—Peremptory Instruction.—Inference.**—In an action to quiet title, in which, under the particular circumstances, it devolved upon the plaintiffs, who claimed under a will, to establish the invalidity of deeds under which the defendants

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claimed title, the validity of the deeds depending on the sufficiency of the delivery thereof, there was no error in giving a peremptory instruction for the defendants, in view of proof of undisputed facts which were reasonably susceptible only of the inference that the grantor intended a delivery of the deeds. pp. 628, 630.

From Miami Circuit Court; *Charles A. Cole*. Judge.

Action by Ora M. Chamness and others against Carrie M. Hiller and others, in which the Kokomo Trust Company was joined as a plaintiff. From a judgment for the defendants, the plaintiffs appeal. *Affirmed*.

Albert Ward, Rabb, Mahoney & Fansler and *M. Winfield*, for appellant.

Long, Yarlott & Souder, Blackledge, Wolf & Barnes and *B. B. Richards*, for appellees.

CALDWELL, J.—Appellants, Ora M. Chamness, Spencer L. H. Chamness, Rebecca A. Chamness, and Frank M. Chamness, brought this action in the Cass Circuit Court against appellees, Carrie M. Hiller, Edna Ballard and husband, and Mary E. Semans and husband, to quiet title to 120 acres of land in Cass county. Subsequently, by reason of certain provisions of the last will of Lewis F. Murphey, deceased, appellant Kokomo Trust Company, as executor of such will, was joined as a plaintiff. Appellees Carrie M. Hiller, Edna Ballard, and Mary E. Semans, claiming to own the lands involved, each a forty-acre tract thereof, by cross-complaint sought to quiet their respective title against appellants. Answers were filed, and the cause placed at issue. A trial in the Cass Circuit Court resulted in a judgment in favor of appellees. A new trial as of right having been granted appellants, a trial on change of venue was had in

the Miami Circuit Court before a special judge and a jury. At the close of the evidence, the jury, in obedience to a peremptory instruction, returned a verdict in favor of appellees, on which judgment was rendered. An intelligent comprehension of the questions presented requires a brief statement of the facts as follows:

William H. Holland, a widower, died intestate in 1898. Three daughters had been born to him, Caroline, Sarah Alice, and _____. Caroline married Lewis F. Murphey, and in 1882 died intestate, leaving surviving her one child, the appellant Ora M. Chamness. The other individual appellants are children of the latter. After the death of Caroline, Sarah Alice also was married to Lewis F. Murphey. She died childless and intestate in July, 1912. William H. Holland's other daughter married a man named Hiller, and died after the death of her father. Appellees are her children. It will be observed that Ora M. Chamness and appellees are nieces of Sarah Alice Murphey. William H. Holland at the time of his decease owned 400 acres of land, which descended in equal parts to his heirs Ora M. Chamness, Mrs. Hiller and Sarah Alice Murphey. In a division, Ora M. Chamness became the owner in severalty of 160 acres, and Mrs. Hiller and Sarah A. Murphey of 240 acres as tenants in common. Subsequently, the latter acquired by purchase certain town property. At her decease, her husband, Lewis F. Murphey, inherited from her such town property, and an undivided one-half of the 240 acres. In a division he subsequently became the owner in severalty of the 120 acres involved in this action. Lewis F. Murphey died testate in November, 1912. It is conceded here that, by

the terms of his last will, the title to all the real estate of which Lewis F. Murphey died the owner is held and owned in trust by appellant trust company for the period of the natural life of Ora M. Chamness for the use and benefit of herself and children, and that such children own the fee subject to such life estate. It is conceded, also, that appellants' claim of title to the lands involved in this action is based solely on such will. At the time of the execution of such will, Lewis F. Murphey was not the owner of the lands involved here, and such lands are not described or specifically referred to therein, the devises being expressed in general terms.

It is conceded, also, that appellees claim title to such lands only under certain writings in the form of deeds, signed and acknowledged by Lewis F. Murphey on August 20, 1912. If, under the rules that govern, it may be said that such writings were effective as deeds, to pass title, then the judgment must be affirmed, otherwise reversed.

The facts are as follows: During the last years of his life, Lewis F. Murphey resided at Galveston in Cass county. Benjamin F. Richards, an attorney, also resided at Galveston and attended to most of Mr. Murphey's legal business, and during the last year's of the latter's life was the custodian of his will. Shortly after the decease of his second wife, Murphey, as we have said, acquired title in severalty to the lands involved here, an undivided interest in the 240-acre tract having been inherited by him on the decease of his said wife. Shortly thereafter, on August 20, 1912, Murphey called at Richards' office, and recited to him that he had an understanding with his wife that the lands should go to her four nieces,

Ora M. Chamness and appellees, in equal parts. He thereupon directed Richards to prepare four deeds, one conveying the town property to Mrs. Chamness, his daughter, and the others conveying 120 acres to appellees, a designated forty-acre tract to each of them. He directed that the deed to Mrs. Semans and the deed to Carrie M. Hiller should each recite that the grantee therein should pay to Mrs. Ballard \$500 by reason of a difference in the value of the tracts. He directed that each of these deeds be worded so that he might retain possession and control of the lands described during his life, with the right to sell and convey if he desired to do so. Richards prepared the deeds in Murphey's absence. Later in the day he returned, Richards read the deeds to him, and he also read them himself. He pronounced them all right, and then signed and acknowledged them. He then directed Richards to keep the deeds in his safe. He said further: "In case I should die, you have those deeds recorded and delivered to the girls just as soon as I am gone. I have got it in my head that I am not going to be here long; I want them fixed up." He said, also, respecting the deeds: "Keep these for the girls, and when I die, have them recorded right away, and deliver them—hand them over to where they belong." Richards asked him if he desired that he should tell the girls about the deeds. Murphey replied: "I would just as soon or a little rather you would tell them." Richards informed Carrie Hiller of the making of the deeds. The other girls he did not see prior to the death of Murphey. The above conversation between Murphey and Richards was had immediately after the deeds were signed. The deeds remained in Richards' possession until Murphey's

death. Two days later, November 7, 1912, he caused them to be recorded, and then delivered them to the grantees. Murphey remained in possession of the real estate involved, but made no effort to sell or convey any portion of it after the making of the deeds to appellees.

The deed to Mrs. Semans is as follows:

“Warranty Deed.

“Lewis F. Murphey to Mary E. Semans.

“This Indenture Witnesseth: That Lewis F. Murphey, unmarried and surviving husband of Sarah A. Holland Murphey, deceased, of Cass County in the State of Indiana, convey and warrant to Mary E. Semans of Adams County in the state of Indiana, for the sum of Love and Affection and One Dollar *and other considerations named below* the following described real estate, situate in Cass County, in the state of Indiana, to-wit (describing one forty-acre tract). This conveyance is made as a gift to the grantee *except that the said grantee at the death of the grantor shall pay to Edna Ballard the sum of Five Hundred Dollars.* And the grantor reserves full possession and control of the above described real estate and the right to sell and convey said real estate during his life time, but at his death if he die seized of the above real estate, then this conveyance shall be in full force and effect *after the payment of the above sum as set forth.*”

The respective deeds signed in favor of Carrie M. Hiller and Mrs. Ballard are identical with the foregoing, except as to grantee and lands described, and except also the portions of the Semans deed which

we have italicized. Such italicized portions of the deed appear also in the Hiller deed, but are omitted from the Ballard deed. Each deed was properly signed, acknowledged and certified.

We are required first to construe these writings, and, second, to determine whether they were delivered. In construing the deeds, we shall not consider or give any weight to the provision for the payment of \$500 found in two of them, as no point is made on such provision in the briefs. In construing these writings, we shall for the present assume that the formalities of delivery requisite to their validity as deeds were properly observed. On such assumption, it is appellants' contention that these instruments disclose by their contents that they are testamentary in character and that as the steps required by the statute in the execution of wills were not taken, in that they were not attested by witnesses, they are of no effect. We therefore proceed to determine whether they are testamentary or in the nature of deeds.

It will be observed that these writings are not couched in testamentary terms. The characterizing language of wills is absent. Nothing is in

1. terms devised or bequeathed. The writings contain all the statutory elements of warranty deeds. §3958 Burns 1914, §2927 R. S. 1881. In each there is a grantor and grantee designated as such. In each the grantor by the terms of the writing "conveys and warrants" to the grantee certain described premises for an expressed consideration, and each instrument is dated, signed, and acknowledged as is required in case of a deed. In addition, looking to extraneous facts, Murphey had theretofore executed a will which was in existence. In these writings there

is no language revoking former wills. Moreover, he stated at the time that he wanted deeds prepared, and he left them with Richards referring to them as deeds. It is therefore evident that Murphey in fact intended that they should operate as deeds. Such line of argument, however, is not conclusive. Appellants, in recognition of such fact, point to certain provisions of the deeds and insist that such provisions stamp the instrument as testamentary. Such provisions are those by which Murphey in terms reserved possession and control of the real estate and the right to sell and convey it within his lifetime, but that the conveyance should be effective at his death if he died seized of it. The courts of this state have frequently announced the rule that must be applied in determining whether a certain writing is a deed or testamentary in nature, as follows: " 'An instrument having all the formalities of a deed will be construed to operate as a deed, wherever it appears therefrom that it was the intent of the maker to convey any interest whatever to vest upon the execution of the paper. If, however, it appears that all the estate which it was the purpose to convey was reserved to the grantor during his life, and that the deed was only to take effect upon the death of the grantor, it will be construed to be testamentary in character.' " *Kelley, Gdn., v. Shimer* (1898), 152 Ind. 290, 53 N. E. 233.

In discussing the nature of a testamentary provision and in distinguishing it from a provision amounting to a conveyance, the Supreme Court, in *Heaston v. Krieg* (1906), 167 Ind. 101, 111, 77 N. E. 805, 119 Am. St. 475, said: "It is, of course, essential to distinguish between such provisions and those in which the beneficiary takes some interest, vested

or contingent, upon the execution of the instrument.” There are certain other rules: Thus, effect must be given to the grantor’s intent as gathered from all the provisions of the instrument, and, in deducing such intent, the instrument must be construed most strongly against the grantor as between him and the grantee. *Wilson v. Carrico* (1895), 140 Ind. 533, 40 N. E. 50, 49 Am. St. 213. Moreover, such an instrument should be so construed that some effect may be given to it if reasonably possible. *Davenport v. Gwilliams* (1892), 133 Ind. 142, 31 N. E. 790, 22 L. R. A. 244.

The writings here, if deeds, and if delivered at all, were delivered through the instrumentality of a third person. In such a case, as hereinafter appears,

2. the title conveyed relates back to the execution of the instrument completed by delivery to the grantee. As we are for the present assuming the delivery of the writings, we must, in applying the rule first above quoted, construe language used therein respecting the vesting of interest or title on the execution of the instrument as referring by relation to the time of delivery to such third person.

The granting clause of the deed here is sufficient in form to convey to the grantee a fee-simple estate.

§3958 Burns 1914, *supra*. The reservation is

3. double in phase. First, the grantor reserves possession and control of the lands during his lifetime in connection with which there is a provision that the conveyance shall be in full force and effect at his decease. A provision of a deed by which the grantor reserves to himself full control of the premises during his natural life is a reservation of a life estate, the fee vesting on the execution of the deed, if its granting clause is sufficient to that end. *Tim-*

mons v. Timmons (1911), 49 Ind. App. 21, 96 N. E. 622. "The general rule laid down by the authorities is that a declaration that the deed shall not go into effect until the death of the grantor does not give it a testamentary character." *Kelley, Gdn., v. Shimer, supra*. The Supreme Court, in *Kelley, Gdn., v. Shimer, supra*, *Wilson v. Carrico, supra*, and *Cates v. Cates* (1893), 135 Ind. 272, 34 N. E. 957, considered and constructed instruments in the form of deeds containing recitals to the effect that the conveyance should not be effective until the death of the grantor. In the opinions in such cases, the decisions are examined and analyzed at length. Further discussion here would therefore be mere repetition. The holding in such cases is that such language recited in a writing in the form of a deed does not characterize it as testamentary in nature; that the effect of such a recital is the reservation of a life estate, possession and enjoyment merely being thereby postponed until the death of the grantor; that, if the language of the instrument is otherwise sufficient, a fee vests on the execution of the deed, subject to the reserved life estate. To the extent that we have discussed them, the writings here are of a like nature.

We have yet to consider, however, the recital to the effect that the grantor reserved also the right to sell and convey the real estate, and that the conveyance should be in full force and effect at his death if he died seized of the lands. The situation, then, is as follows: The grantor conveyed the lands by the use of language creating a fee, reserving to himself a life estate, with power to dispose of the fee by conveyance within the period of his lifetime. Within rules already referred to, these deeds should be so

construed as that, if possible, some effect be given to them, and hence it should not be presumed that the grantor by the reserved power to convey, unless exercised, intended to destroy the estate in fee created by the granting clause of the deed. *Cates v. Cates, supra*; *Davenport v. Gwilliams, supra*; 8 R. C. L. 1049; *Durand v. Higgins* (1903), 67 Kan. 110, 72 Pac. 567; *Nichols v. Emery* (1895), 109 Cal. 323, 41 Pac. 1089, 50 Am. St. 43; *Pritchett v. Jackson* (1906), 103 Md. 696, 63 Atl. 965. Moreover, where, after a consideration of a deed in all its parts and the application of the recognized rules of construction, some subsequent portion of the instrument as the *habendum* is indicative of an intent which, if given effect, would be destructive of an estate plainly created by the granting clause, the latter will prevail over the former. *Marsh v. Morris* (1892), 133 Ind. 548, 33 N. E. 290; *Lamb v. Medsker* (1905), 35 Ind. App. 662, 74 N. E. 1012; *Carl-Lee v. Ellsberry* (1907), 82 Ark. 209, 101 S. W. 407, 12 L. R. A. (N. S.) 956, and note, 118 Am. St. 60; 8 R. C. L. 1044.

We do not believe that the expressed reservation of possession and control of the premises during the lifetime of the grantor, with the right to sell

4. and convey within such time, should be held to be destructive of the estate in fee granted by the conveying clause of the deed. The deeds should be construed in each case as granting a fee from which a life estate was excepted, with a reserved power which, had it been exercised, would have terminated or defeated the remainder in fee vested in the grantee by the conveying clause. The grantor, as the owner of the entire estate in the lands, had a right to convey to another an estate therein of any

designated quantity or quality from the least to the greatest, and we know of no reason why he did not have the power to convey to the grantee in each case, as we hold he did, a vested remainder in fee defeasible on the exercise of a reserved power. Such holding, of course, is based on the assumption that the deeds were delivered, recourse being had also to the principle of relation aforesaid. An analogous situation arises where by deed or will a life estate with power of disposition is granted or devised with remainder in fee over to another. In such a case, it is not held that the granted power enlarges the life estate into a fee to the annihilation of the remainder over, but rather that the life estate remains in quantity a life estate; that the remainder over is defeated only by the exercise of the power. *Beatson v. Bowers* (1910), 174 Ind. 601, 91 N. E. 922; *Foudray v. Foudray* (1909), 44 Ind. App. 444, 89 N. E. 499; *Dunning v. Vandusen* (1874), 47 Ind. 423, 17 Am. Rep. 709; *Chewning v. Mason* (1912), 158 N. C. 578, 74 S. E. 357, 39 L. R. A. (N. S.) 805, and note; *Steiff v. Seibert* (1905), 128 Iowa 746, 105 N. W. 328, 6 L. R. A. (N. S.) 1186, and note. In *Kelley, Gdn., v. Shimer, supra*, the Supreme Court, in discussing the question of what recitals in a writing will characterize it as testamentary rather than a present conveyance of title with postponed possession and enjoyment, quotes the following from a deed involved in *Wall v. Wall* (1855), 30 Miss. 91, 64 Am. Dec. 147, as belonging to the latter class: " 'The deed to take effect as far as regards the *handing over* of the property *at my death*; and I reserve the right *to revoke it* at any time during my life, by filing in the clerk's office a written revocation under my hand and seal; and I do hereby make known and

declare, that the signing, sealing and delivery of this deed, and *placing the same amongst my papers*, is intended by me as *a delivery of said property at my death, and to take effect at that time.*’” In the Wall case, the granting clause of the deed was sufficient to convey a fee. The deed not having been revoked in the manner provided, the Court of Appeals of Mississippi held the deed valid, the court saying: “Upon the whole, we consider that this deed conveyed the present right to the property, to be enjoyed in possession at the donor’s death and subject to his power to annul it in the way limited in the deed.” See, also, *Nichols v. Emery, supra*. We conclude that each of the deeds involved here, assuming their delivery, granted a present estate in fee, subject to a life estate, defeasible by reason of a reserved power, but which ripened into an indefeasible fee by the nonexercise of the power within the time limited.

Having determined the nature of the deeds involved here, and the estates and interests thereby granted and reserved, we proceed to the ques-

5. tion of delivery. The parties agree respecting the facts: Murphey, having signed and acknowledged the deeds, handed them to Richards, his accompanying statements being in substance as follows: “Keep these deeds for the girls; keep them in your safe; when I die have them recorded right away and deliver them—hand them over to where they belong; have them recorded and deliver them to the girls just as soon as I am gone.” He also expressed a desire that the grantees be informed of the facts. Such, in substance, were Murphey’s directions to Richards, without limitation or qualification—take the deeds, keep them for the grantees, when I die have

them recorded, and then deliver them to the grantees. It is not claimed that such instructions were modified by any other directions given. Such instructions were carried out literally. Under such circumstances, were the deeds delivered? The general principles that govern under such circumstances have frequently been announced by the courts. There is no doubt that a deed made by the grantor and delivered by him to a third party to be delivered to the grantee on the death of the grantor, if so delivered to the grantee and accepted by him, may be valid as between the parties, and also as against others taking with notice. *Smiley v. Smiley* (1888), 114 Ind. 258, 16 N. E. 585. If, under such circumstances, the grantor, when he delivers the deed to the third person, parts with all dominion, and reserves no right to recall it or alter its provisions, it is settled in this state that the delivery is effectual and that the grantee on the decease of the grantor succeeds to the title, the deed taking effect by relation as of the date of the delivery to such third person. *Osborne v. Eslinger* (1900), 155 Ind. 351, 58 N. E. 439, 80 Am. St. 240, and cases; *Newman v. Fidler* (1911), 177 Ind. 220, 97 N. E. 785.

The following have been frequently quoted with approval by the courts of this state: "In determining what will constitute a sufficient delivery, it

6. is found that the intention is the controlling element. No particular formality need be observed, and the intention to deliver the deed may be manifested by acts or by words or by both. But one or the other must be present to make a good delivery." Tiedeman, *Real Property* (2d ed.) §813. "Where the deed is delivered to the grantee named, the law presumes it was done with an intent on the

part of the grantor to make it his effectual deed; but if it is delivered to a stranger, and nothing is said at the time, no such inference is drawn from the act of delivery. * * * If delivered to the grantee himself, no words are necessary, since the law presumes in such case it is for his use. If delivered to a stranger, there is no presumption; and there must, therefore, be some evidence beyond such delivery of his intent thereby to part with the title. But no precise form of words is necessary to declare such intent. Anything that shows that the delivery is for the use of the grantee is enough." 3 Washburn, Real Estate (5th ed.) 314; see *Osborne v. Eslinger*, *supra*.

Murphey's intent when he delivered the deeds to Richards was manifested by plain and unequivocal language—take the deeds and keep them for the grantees and deliver them to the grantees at my death. In the case last cited, in effect the following distinction recognized by the authorities, is drawn: Where the grantor, after signing the deed, delivers it to a third person with unconditional instructions that he either presently or on the happening of some inevitable event deliver it to the grantee, the grantor reserving no right to control the disposition of the deed or to modify it, a trust thereby arises of which the grantee is the beneficiary, and which trust may be enforced by him, but which may not rightfully be violated by either the grantor or such third person. Under such circumstances, the third person becomes trustee for the grantee, the involved trust to be completely executed at the time and by the performance of the act appointed at its creation. But where the deed is placed in the hands of the third person by the grantor for safekeeping and subject to future

orders and directions, the latter reserving the right to control its disposition by such future orders and directions, the third person thereby becomes agent of the grantor rather than trustee of a trust of which the grantee is beneficiary, and the deed may not be effectually delivered to the grantee in the absence of such future unqualified orders and directions, and without such directions may not be delivered at all after the death of the grantor: First, because the third person has received no orders to that end; and, second, out of the transaction there arises merely the relation of principal and agent which, subject to qualification under special circumstances, terminates at the decease of the principal. The cases to which we have referred cite many others where these principles are discussed. See, also, extensive notes to *Munro v. Bowles* (1900), 54 L. R. A. 865; *Murray v. Kerney* (1912), 38 L. R. A. (N. S.) 937; *Pentico v. Hays* (1907), 9 L. R. A. (N. S.) 224; also, 8 R. C. L. 988, 991 *et seq.*

We do not believe, as urged, that the reservation contained in each of the deeds of a right to sell and convey the premises should be taken as a part

7. of the instructions given to Richards. The reservation deals with the quantity of estate conveyed. The instructions dealt with the disposition of instruments conveying such quantity of estate. Assume that Murphey had brought the deeds to Richards fully prepared, signed and sealed in an envelope, and had informed him that the envelope contained deeds which he had made to these grantees, and had then delivered them to Richards, with positive instructions to keep and deliver them to the grantees on Murphey's death—under such circumstances, the

reservation contained in the deeds could not have been construed as a part of Murphey's instructions, as he would have had no knowledge of such reservation. Or, assume that the reservation was of a right to sell and convey the south half of each tract, or merely of a right to remove a building, or to execute a lease or the like—it could scarcely be said that the reservation in either of the assumed cases should be construed as a part or in modification of instructions with reference to the disposition of the deeds. In each of the assumed cases, the reservation, as here, deals with the quantity of estate or interest conveyed, rather than with the disposition of the deeds. The reservation here is narrower than the estate conveyed. It is not of a right to defeat the estate generally, but only in a specified manner. It was a right merely to sell and convey. Under such reservation, Murphey could not rightfully have mortgaged the lands, or devised them, or executed a lease thereon extending beyond his lifetime, or taken the deeds from the possession of Richards. He reserved the right only in a specified manner to defeat the fee which he had conveyed. We believe that the reservation and the instructions are distinct propositions.

We do not doubt that the facts here were amply sufficient to have sustained a verdict in favor of appellees, returned on a general submission

8. under proper instructions. The fact that a peremptory instruction was given at the close of the evidence, however, has given us some concern. The situation is somewhat peculiar. It is conceded, as we have said, that appellants claim only under the will, and that appellees claim only under the deeds. Appellants concede that if the deeds are valid they

were not entitled to recover. Appellants were the moving parties. In order that they might recover, it was necessary that they establish that Murphey owned the land at his decease. These lands were not referred to in the will, and hence appellants could not ground even a *prima facie* case on the will. To prove that Murphey died the owner of the lands, it was necessary that they establish the invalidity of the deeds. This they undertook to do, developing facts as we have indicated, that the deeds were deposited with Richards with unqualified instructions that they be delivered to the grantees, that they were so delivered and accepted. If these facts fail to disclose the invalidity of the deeds, and especially if they establish that it was Murphey's intent thereby to deliver the deeds for the use of, and ultimately to, the grantees, then appellants' case fails, and at the same time appellees' title is established. To constitute a delivery, there must be intention to part with control over the deed. *Berry v. Anderson* (1864), 22 Ind. 36. There must be an intention to place the deed under the control of the grantee, or some one for his use. *Hotchkiss v. Olmstead* (1871), 37 Ind. 74. "Ordinarily, the question as to the delivery of a deed is one of fact, to be determined by the jury. But it may arise in a form to present only a question of law for the determination of the court, or it may present a mixed question of law and fact, in which the jury determines the facts, and the court the law arising upon the facts as proved." *Somers v. Pumphrey* (1865), 24 Ind. 231. "It is proper for the court to direct a verdict for the defendant when the essential facts showing that the plaintiff has no right to recover are not controverted, or where, taking the plaintiff's

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evidence and all the legitimate inferences which a jury might reasonably draw from it, it is insufficient to sustain a verdict in his favor, so that a verdict for the plaintiff, if one should be returned, would be set aside." *Hanna v. Terre Haute, etc., R. Co.* (1889), 119 Ind. 316, 21 N. E. 903. See, also, *Oleson v. Lake Shore, etc., R. Co.* (1896), 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149, and cases.

The facts here, as we have said, are undisputed. We believe them to be reasonably susceptible only of an inference that Murphey intended a delivery of the deeds. Under the foregoing rules, we therefore conclude that the court was warranted in instructing the jury in appellees' favor. The specific questions presented on this appeal relate to the sufficiency of the evidence, and the refusal of certain instructions. Our discussion disposes of all the questions presented.

The judgment is affirmed.

NOTE.—Reported in 116 N. E. 332. Deeds: What is a delivery of a deed, 53 Am. St. 537; efficacy of deed deposited with third person to be delivered after grantor's death, Ann. Cas. 1915C 378; construction of instrument in form of deed to become effective upon death of grantor, 7 Ann. Cas. 790, Ann. Cas. 1916D 906. See under (1) 40 Cyc 1085; (3) 40 Cyc 1085.

GUTHRIE ET AL. v. STATE OF INDIANA, EX REL. HUGHES
LUMBER COMPANY.

[No. 9,563. Filed May 16, 1918.]

1. BRIDGES.—*Construction.—Contractor's Bond.—Action.—Evidence.*—Evidence establishing that the plaintiff sold to the defendant, a bridge contractor, certain materials for the construction of a

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bridge and delivered the materials at the bridge, that they were not paid for, and that the amount due was found by the court, is sufficient to establish a *prima facie* case against the contractor and his bondsmen. p. 634.

2. **BRIDGES.—Construction.—Bonds.—Materials Used.**—A county, by virtue of its implied powers, may require a construction bond with conditions broader than those required by statute; hence, in an action against the contractor and his bondsmen, a materialman may recover for materials furnished and used in the construction of a bridge, if covered by the bond, although they form no part of the structure. p. 634.
3. **PAYMENT.—Application.—Priority of Debts.**—Where a bridge contractor, after completion of the structure, paid to a materialman money not received on the bridge contract, without specific instructions as to its application, the court did not err in upholding the disposition thereof made by the materialman in applying it first to the payment of an older debt and crediting the balance on the bridge account. p. 635.
4. **EVIDENCE.—Opinions.—Intent of Others.**—Testimony of a witness as to the intent of another must be confined to acts and declarations showing intention. p. 635.

From Morgan Circuit Court; *Nathan A. Whitaker*, Judge.

Action by the State of Indiana, on relation of the Hughes Lumber and Grain Company, against Lewis P. Guthrie and another. From a judgment for the plaintiff, the defendants appeal. *Affirmed.*

Bingham & Bingham, for appellants.

Kivett & Kivett and *A. M. Bain*, for appellee.

IBACH, C. J.—This is an action upon a contractor's bond to recover for material furnished by appellee in the construction of a public bridge. The complaint is in one paragraph and alleges the execution of a contract and bond; that by the terms of the contract it was agreed that appellant Guthrie would do and complete the work of constructing certain bridges, including the "Sycamore Bridge," and furnish all

labor, tools, and material required for such work; that the bond was conditioned that said Guthrie should "well and faithfully do and perform" the terms of said contract in all respects, according to the plans and specification adopted and "should promptly pay all indebtedness incurred in the prosecution of said work, including labor, materials furnished and for boarding the laborers thereon." It is further alleged that said Guthrie did enter upon the contract and constructed said bridge; that appellant sold, furnished and delivered to said contractor certain material at his special instance and request, a bill of particulars of which is filed with the complaint; that all said material "was purchased for and used in the construction and erection" of the bridges as contracted, and has not been paid for, although demanded.

Issues were formed on this complaint by answer in general denial and a further plea of payment by the appellant company. A trial by the court resulted in a general finding and judgment for appellee. A motion for a new trial upon the grounds that the amount of recovery is erroneous, being too large, that the decision of the court is not sustained by sufficient evidence and is contrary to law, and the exclusion of certain evidence, was overruled, and such ruling is assigned as error and relied on for reversal.

The contract and bond were read in evidence. Other evidence favorable to appellee shows that Mr. Guthrie went to appellee and informed it that he wanted to purchase material for the construction of a bridge across Sycamore creek and contracted a certain amount of cement and lime for such purpose. He also asked that the items which were to go into the

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bridge be kept separate. Appellee sold Guthrie the material in question for such purpose and delivered it to him at the place where the bridge was constructed. There was a balance of \$471.88 due appellee for material. Further than the facts as they appear, there was no evidence that the material furnished was actually used in the bridge or in the prosecution of its construction.

As tending to support the plea of payment there is evidence tending to show that certain payments and credits were made on the material account for this bridge, leaving the balance as above. It also shows that appellant Guthrie had an old account with appellee of \$132.53; that on September 22, 1913, after the bridge had been completed, Guthrie made a payment of \$200 to appellee. Out of this amount appellee credited appellant with \$132.53 on his old account, and applied the balance to the bridge account. It further appears that at the time this payment was made no directions were given as to where it should be applied. It is also shown that the \$200 paid was borrowed money, and did not come out of the proceeds of the bridge contract.

Appellants' contentions may be summarized as follows: (1) There is no evidence to show that the material involved was used in the construction of the bridge; (2) certain material, e. g., wire, nails, lumber, etc., were not necessary to construct a concrete bridge of which the court will take judicial notice; (3) that appellee had no right to take the payment of September 22, 1913, and apply a part of it in satisfaction of the old account.

Upon the first proposition appellee insists that the evidence establishes that appellant Guthrie contracted

for the materials from it with which to construct the bridge in question; that it furnished the materials and delivered the same at the bridge; that they were not paid for and the amount due is as found by the court. It is the position of appellee that this evidence is sufficient to give rise to the inference that the material was used in the bridge. We are of the opinion that upon this point the evidence was sufficient to make out a *prima facie* case for appellee, which was not rebutted by appellant. *Fry v. P. Bannon Sewer Pipe Co.* (1912), 179 Ind. 309, 316, 101 N. E. 10.

As relating to the right to recover for certain materials which appellants claim could not have gone into the structure itself, it has been held that

2. by virtue of its implied powers a county may require a bond with conditions broader than that provided by the statute, and that such conditions are enforceable. *Title Guaranty, etc., Co. v. State, ex rel.* (1915); 61 Ind. App. 268, 281, 291, 109 N. E. 237, 111 N. E. 19. Even under the strict rule applicable to the mechanic's lien statute, the modern trend of authority is to the effect that for items of the kind here complained of, if actually used in the prosecution of the work, a recovery may be had. *Baldwin Locomotive Works v. Edward Hines Lumber Co.* (1917), 116 N. E. 739, and cases cited. We are not, however, driven to this rule, for under the terms of the contract and the conditions of the bond in this case the court was warranted in permitting a recovery for such material. *Smiley v. State, ex rel.* (1915), 60 Ind. App. 507, 110 N. E. 222. This court held in the case last cited, involving a bond conditioned substantially as the bond in suit, that a recovery could

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be had for coal used by a contractor to operate an engine for crushing stone used on the road being constructed and for hauling tools.

In view of the evidence that the money which it is claimed was wrongfully credited to an old account was borrowed money, and that no specific direc-

3. tions were given for its application, the court did not err in upholding the disposition made by appellee in crediting a part to the old account. *Barrett v. Sipp* (1911), 50 Ind. App. 304, 311, 98 N. E. 310.

The court did not err in excluding the evidence complained of. One cannot be permitted to testify as to the intent of another. The only compe-

4. tent evidence that a witness may give as to intent is to state the acts and declarations showing intention. *Zimmerman v. Marchland* (1864), 23 Ind. 474, 476.

The court did not err in overruling the motion for a new trial. The cause seems to have been fairly tried and a correct result reached. Judgment affirmed.

NOTE.—Reported in 119 N. E. 518. See under (8) 30 Cyc 1243; (4) 17 Cyc 153.

BECK v. INDIANAPOLIS TRACTION AND TERMINAL COMPANY.

[No. 9,552. Filed May 17, 1918.]

1. STREET RAILROADS.—*Collisions*.—*Instructions*.—*Province of Jury*.—Where the driver of a hearse attempted to drive diagonally across street car tracks and was struck by a street car, in an action for the damages occasioned thereby, an instruction that, if the driver of the hearse drove on the tracks when he might have

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stopped after observing that the motorman was not looking, there could be no recovery, was improper as an invasion of the province of the jury, since the jury had the right to determine whether the driver acted as a reasonably prudent person would have acted under the same circumstances. p. 643.

2. **STREET RAILROADS.—Operation.—Ordinary Care.**—Ordinary care required the motorman of a street car to keep a lookout ahead. p. 645.

3. **STREET RAILROADS.—Collisions.—Contributory Negligence.**—Where the driver of a hearse started to drive diagonally across street car tracks, when a car 150 feet away was approaching at the rate of six to ten miles an hour, the mere fact that he saw the motorman looking in an opposite direction would not be sufficient to charge him with contributory negligence as a matter of law. p. 645.

4. **STREET RAILROADS.—Collisions.—Contributory Negligence.—Custom.**—In an action for damages sustained by the plaintiff in a collision between a hearse and a street car, where the defendant admitted a custom to give funeral processions the right of way, an instruction that, though the plaintiff, the driver of the hearse, had an equal right with the defendant to drive on that part of the street occupied by the tracks, it was his duty on seeing the car to drive off the tracks, was improper as ignoring the admitted custom. pp. 645, 646.

From Marion Superior Court (99,404); *W. W. Thornton*, Judge.

Action by Frank A. Beck against the Indianapolis Traction and Terminal Company. From a judgment for the defendant, the plaintiff appeals. *Reversed.*

Joseph Collier, for appellant.

Ralph K. Kane, *F. Winter* and *W. H. Latta*, for appellee.

HOTTEL, J.—This is an appeal from a judgment in appellee's favor in an action brought by appellant for damages alleged to have resulted from a collision of appellee's car with appellant's hearse.

The issues of fact were tendered by a complaint in one paragraph and a general denial thereto. A trial

by jury resulted in a verdict for appellee. A motion for new trial, filed by appellant, was overruled. This ruling is assigned as error. The grounds of said motion relied on as presenting reversible error challenge the applicability and correctness of certain instructions given by the court.

It is necessary to a proper understanding of our discussion of said instructions, and our disposition of the questions presented by the alleged errors, predicated on the giving of them, that we indicate the issues and evidence to which they were addressed.

The averments of the complaint pertinent to said questions are in substance as follows: Appellee is a corporation and, as such, on June 10, 1913, operated street cars over surface tracks located on Washington street, in the city of Indianapolis. On said day appellant's funeral car, while leading a funeral procession, drove onto and attempted to cross over appellee's car tracks near the intersection of said street with California street in said city. When a funeral car approaches and attempts to move across the track of appellee in said city, there is a custom observed by appellee under which its cars come to a full stop and give the funeral procession the right of way. Appellant's servant in charge of said funeral car had notice of and relied on said custom. The street car which collided with the funeral car was 150 feet from the funeral car as the latter moved onto appellee's track, and there was nothing to obstruct the view of those in charge of the street car, and, had they looked ahead, they could have seen the funeral car continuously from the time it was 150 feet or more away until it reached the point of collision. "Appellee disregarded said custom and negligently failed to

observe said funeral car and to stop said street car, or negligently failed and omitted to exercise reasonable care to stop said street car, or negligently failed and omitted to have the street car properly equipped with braking devices." As a proximate result of said acts of negligence, said street car collided with said funeral car without any negligence of appellant or his servant in charge of the funeral car contributing thereto.

There was evidence offered by appellant showing, or tending to show, the following facts: At the time of the collision, appellee, by its servants, was operating one of its cars west over its north track on Washington street, and appellant, by its servants, was driving its hearse at the head of a funeral procession moving east on said street. A custom was testified to under which appellee's agents and servants in charge of its street cars had been in the habit of stopping and holding its cars when a funeral procession approached and moved across its tracks, and it was admitted by appellee that there was a custom observed by it which gave the right of way to funerals. A Mr. Finn testified in substance that on the occasion in question he was on the hearse, in charge of the funeral; that the hearse led the procession and prior to the collision was moving east on the north side of Washington street; that the south side of Washington street east of California was blocked; that at this crossing, about where the traffic crossed, the hearse moved southeast from the north to the south side of the street; that, when the hearse started across appellee's north track, appellant's car, approaching over said track from the east, was about 150 feet east of the hearse, at which time the motor-

man was looking to the north; that, as they started to cross the track, he (the witness) signaled the motorman to stop the car; that from this position the hearse moved southeast, the car moving at slow speed toward it; that when within about twenty-five or thirty feet of the car he saw that the motorman was still looking toward the north and did not see them; that he then hallooed and threw up his hands to attract his attention; that the car struck the rear left wheel of the hearse; that when they drove onto said track he knew of said custom and believed the motorman would see them and stop the car. Other witnesses offered by appellant testified to seeing the collision and to seeing the motorman looking toward the north while the hearse was moving southeast over the north track. One of these witnesses testified that, when the car was fifty feet from the hearse, the man on the hearse threw up his hands, but that the motorman was not looking and the car hit the rear left wheel of the hearse. Another witness testified that he saw the man on the hearse throw up his hands when the car was about 100 feet away; that the motorman was not then looking toward the hearse, but was looking toward the north. Another witness testified that he was driving the carriage behind the hearse; that at the time the horses drawing the hearse started across the north track the car was 150 feet east, and the motorman was then looking toward the north; that the hearse moved southeast and when within twenty-five or thirty feet of the car Finn threw up his hands and hallooed, at which time the motorman saw them and attempted to stop his car, but failed, and the car hit the rear left wheel of the hearse when it was on or near the south rail of the north track. The

driver of the hearse testified to the following effect: The south side of Washington street east of California was obstructed so that I could not drive on that side of the street. When the hearse was two or three feet from the north track and the street car about 150 feet east of us, I turned the horses on the north track and turned around to watch from the northwest to see that a car did not come from that direction before I went on the south track, and while doing so, Finn said, "He does not see us." I turned my head to look and the street car struck the rear wheel of hearse and upset us. The defendant stops the cars for a funeral procession and I knew of this custom and believed it would observe it when I drove on the track, and the first I knew it would not do so was when Finn made the statement, and it was then too late for us to escape.

Witnesses offered by appellee testified in substance as follows: A Mr. Rogers testified that he was a passenger on the car and saw the hearse when 200 feet away up close to the north curb. The hearse moved east and the car west until the hearse was about twenty-five feet from the car, when it turned suddenly southeast and went on the track and the car struck the left rear wheel. Another witness on the car testified to seeing the hearse when twenty-five feet away; that at this time the motorman was looking ahead and his car was moving eight or ten miles an hour, and stopped about three feet after the collision. The conductor on the car testified that he was looking ahead and saw the hearse moving straight ahead about eight feet north of the north rail, until it was within twenty-five or thirty feet of the car, when it was turned south and driven upon the track

in front of the car and hit. The motorman was looking ahead, and, when the hearse turned to go on the track, he attempted to stop the car and ran five or six feet after the collision.

The motorman testified that he did not look to the north; that he saw the hearse moving east about two miles an hour, four to six feet north of the north track; that the car was moving six to eight miles an hour; that, when the hearse reached the alley and was about twenty or twenty-five feet from the car, it turned south and went diagonally across the track; that, when he noticed the horses make the turn, he put on the brakes; that the horses' heads were then over the north rail of the north track; that they continued south about the same speed, and he struck the rear wheel of the hearse when it was on or near the south rail; that the car ran three or four feet after the collision.

The instructions challenged were given at appellee's request, and among them were the following:

"No. 13. If you find from a preponderance of the evidence in this case that those in charge of plaintiff's hearse, when they were in a place of safety and not upon said street car tracks, but to the north thereof, knew that the motorman was not looking in the direction that his car was going but that he was looking away from the direction in which his car was moving, and that while said car was approaching towards plaintiff's hearse that those in charge of said hearse drove same to and upon the track of said street car company immediately in front of said moving car while the motorman was looking in the opposite direction from which the street car was moving, then I instruct you that those in charge of plaintiff's hearse

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were guilty of negligence in driving said hearse to and upon the tracks of said street car company when said motorman was looking in the opposite direction from which said street car was moving; *and if you find in this case, from a preponderance of the evidence that those in charge of plaintiff's hearse had time to stop the same before they drove upon the tracks of the defendant company, while the motorman was looking in the opposite direction from which said street car was moving, then and in that event I instruct you that their failure to stop said hearse before they drove same to and upon the track in front of said car was negligence, and if you find said negligence proximately contributed to the injury of plaintiff's property, then your verdict should be for the defendant.*"

"No. 14. All persons driving vehicles in the streets of a city have an equal right with the street car company to drive on that portion of the street occupied by its car tracks, with this limitation,—that where a car and vehicle drawn by animal power are approaching the same place at the same time, then it is the duty of the driver of the animal drawn vehicle to turn out or off the track, or remain off the track, for the reason that the car cannot do so but must remain on and can only travel on the track."

It is insisted by appellee that instruction No. 13 invaded the province of the jury, in that it told the jury that if appellant's hearse "were driven onto the street car track in front of the street car when the motorman in charge thereof was not looking ahead, it should find appellant guilty of negligence." In support of this contention, appellant cites: *Indianapolis Street R. Co. v. O'Donnell* (1904), 35 Ind. App. 312,

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73 N. E. 163, 74 N. E. 253; *Indianapolis Street R. Co. v. Bolin* (1906), 39 Ind. App. 169, 78 N. E. 210; *Indianapolis Street R. Co. v. Taylor* (1904), 164 Ind. 155, 72 N. E. 1045; *Indianapolis Traction, etc., Co. v. Taylor* (1913), 55 Ind. App. 309, 103 N. E. 812. It is also claimed by appellant that said instruction was inapplicable to the evidence and misleading. The first objection will be first considered.

It is asserted by appellee that said objection or "criticism is not fairly put," that "the instruction tells the jury that if they find that those in charge of the hearse saw and knew that the motorman was not looking while they were still in a place of safety, and that with this knowledge they drove on the street car track *immediately in front* of the moving car, then they would be guilty of negligence," and that such an instruction is correct, citing: *Moran v. Leslie* (1903), 33 Ind. App. 80, 70 N. E. 162; *Citizens Street R. Co. v. Helvie* (1899), 22 Ind. App. 515, 53 N. E. 191; *DeLon v. Kokomo City R. Co.* (1898), 22 Ind. App. 377, 53 N. E. 847.

These cases give little, if any, warrant for the giving of the instruction here involved. While the instruction may be susceptible to the interpreta-

1. tion and meaning indicated, as contended by appellee, the latter portion thereof, which we have italicized *supra*, is likewise susceptible to the interpretation which appellant gives it, viz.: "If while off the track in a place of safety they (appellant's servants) knew that the motorman was not observing ahead and they had time to stop the hearse and did not do so, they were negligent." Under such an interpretation, the instruction entirely takes from the consideration of the jury the questions of the dis-

tance of the hearse from the car when those in charge of the hearse attempted to cross appellee's tracks, the probability of the motorman performing his duty to look ahead before his car reached the hearse, and the probability of his observing the admitted custom of appellee to give the hearse the right of way. In other words, it took from the jury one of the controlling questions, if not the controlling one, in this case, viz., the right to determine whether appellant's servants, under the special facts and circumstances surrounding them at the time they drove the hearse upon said tracks, as indicated by the issues and evidence set out *supra*, acted as reasonably prudent persons would have acted under the same facts and circumstances. Appellant's servant, Mr. Finn, who was in charge of the funeral, testified that, when they started to cross the track, he knew that the motorman was not looking. They were at that time, according to his statement, 150 feet from the car, and, according to all the evidence, were then in a place of safety, viz., two to eight feet north of appellee's tracks. There can be no doubt but that they might have then stopped the hearse and avoided the collision. It being thus, in effect, admitted by appellant's servants that they were in a place of safety and knew that the motorman on said car was not looking ahead when they first started to cross said tracks, and it being apparent and undisputed that they could then have stopped the hearse and avoided the collision, it follows that, under said instruction, there could be but one finding by the jury, if it gave to such instruction the meaning to which we have indicated the italicized portion thereof rendered it susceptible. In other words, the fact made controlling, in the italicized part of said

instruction, in the determination of the question of contributory negligence was not whether those in charge of appellant's hearse *turned it upon the tracks immediately in front of the street car* at a time when they were in a place of safety and knew the motorman was not looking ahead, but, on the contrary, the fact made controlling in the determination of said question was whether those in charge of said hearse had time to stop it "*before they drove upon the tracks * * * while the motorman was looking in the opposite direction from which said car was moving,*" and, as applied to the undisputed facts indicated *supra*, said part of said instruction was in effect the equivalent of directing a verdict for appellee.

Independent of the admitted custom observed in such cases by appellee, appellant, in the absence of knowledge to the contrary, had the right to

2. assume that those in charge of the car would exercise ordinary care to avoid a collision or injury to them in their use of such street. *Indianapolis Street R. Co. v. Bolin, supra.*
3. Ordinary care required the motorman to keep a lookout ahead, and the fact that appellant's servants saw him looking in a different direction when they were 150 feet away from the car, the car then approaching them at the rate of only six to ten miles an hour, would not be sufficient to charge them as a matter of law with contributory negligence simply because they then started across appellee's track. *Indianapolis Street R. Co. v. O'Donnell, supra.*

The custom under which appellee admitted that it gave the right of way to funerals furnishes an additional reason why said question of contribu-

4. tory negligence should have been submitted to the jury to be determined by it in the light of

all the facts and circumstances in the case. Indeed, it is manifest from the issues and the evidence, which we have indicated *supra*, that the controverted question in the case was not whether appellant's servants knew that the motorman was not looking ahead at the time they started across said track, but, as before indicated, this was in effect admitted, and the real controversy related to the distance of the hearse from the car at the time it was turned onto appellee's track, and whether, in view of their distance from the approaching car, the speed at which it was approaching and which they were driving, and the custom known to them and relied on at the time they turned across the track, appellant's servants acted as men of ordinary prudence would have acted. These controverted issues are in effect ignored by said instruction, and, under its italicized portion *supra*, the jury was warranted in returning a verdict for appellant, if at the time they started to cross the track they were then in a place of safety and might have stopped the hearse, but proceeded knowing the motorman was not then observing ahead. We think the court, in said instruction, clearly invaded the province of the jury, and, in doing so, may have influenced the jury to appellant's prejudice in the verdict returned.

Instruction No. 14, *supra*, is objected to by appellant on the ground that it is inapplicable to the evidence and omits the elements of the control of

4. the car, the degree of care required to discover the car, and the care required to escape the danger after its discovery. Without entering into a discussion of these several objections to said instruction, we deem it sufficient to say that, assuming that the instruction correctly states the law as appli-

cable generally to the relative rights and duties of persons driving vehicles and those operating street cars in the streets of a city, its giving in the instant case, without any recognition of the admitted custom of appellee to give the right of way to a funeral procession, was likely to mislead the jury rather than aid it in reaching a correct determination of the controverted question in the case.

Other instructions are challenged by appellant, but the conclusion reached as to those considered makes it unnecessary to discuss or pass upon those remaining. They will probably not be given in their present form upon another trial.

For the reasons indicated, the judgment below is reversed, with instructions to the trial court to grant a new trial, and for such other proceedings as may be consistent with this opinion.

NOTE.—Reported in 119 N. E. 528. Street railroads: Question of right of way as between street car and vehicle at point where streets bisect or intersect, note 49 L. R. A. (N. S.) 505; right of driver of vehicle to assume that motorman will give him time to cross track, note 5 L. R. A. (N. S.) 1061; duty and liability of a street railway as to vehicles moving along its tracks, 7 Ann. Cas. 1127; 18 Ann. Cas. 510. See under (1) 38 Cyc 1648; (2) 36 Cyc 1508; (3) 36 Cyc 1550, 1628.

WISE v. WISE.

[No. 9,638. Filed May 17, 1918.]

1. **APPEAL.**—*Scope of Review.*—*Record.*—*Sufficiency.*—Where the evidence is not in the record, an assignment of error that the court erred in overruling a motion for new trial, on the ground that the decree was not sustained by sufficient evidence, presents no question for review. p. 650.

Wise v. Wise—67 Ind. App. 647.

2. **DIVORCE.—Decree.—Conformity with Pleadings.**—In an action for divorce, where the defendant by cross-complaint alleged that the complainant, representing that her father would deed certain land to them, persuaded the defendant to move on the land, and that he made improvements thereon by his labor and the investment of his separate earnings, that the plaintiff's father failed to deed the land to them, but deeded a life estate therein to the plaintiff with the remainder to their children, whereupon the plaintiff and defendant agreed that all the personal property should belong to the defendant, and the prayer asked for an adjudication of the defendant's property rights, a decree apportioning the personalty used by the parties in common was not without the issues. p. 650.
3. **DIVORCE.—Property Rights.—Adjudication.—Power of Courts.**—In a divorce proceeding, a court having jurisdiction of the parties and the subject-matter has power, if a divorce is decreed, to adjudicate all the property rights growing out of, or connected with, the marriage. p. 653.
4. **DIVORCE.—Adjudication of Property Rights.—Appeal.—Presumption.**—Where the question of personal property rights growing out of, and connected with, the marriage relation was tendered by cross-complaint, the appellate court will presume, in the absence of the evidence from the record, that the adjudication of the property rights, as specifically set forth in the decree, referred to property rights within the issues as tendered by the cross-complaint. p. 654.

From Dekalb Circuit Court; *Dan M. Link*, Judge.

Action by Ida A. Wise against Edgar S. Wise for divorce. From a decree for the defendant on his cross-complaint and against the plaintiff on her complaint, the defendant appeals. *Affirmed.*

Edgar W. Atkinson, for appellant.

J. E. Pomeroy, for appellee.

HOTTEL, J.—Appellant filed in the court below a complaint, in which she sought a divorce from appellee, alimony, and the custody of two minor children. The appellee filed an answer in general denial and also a cross-complaint which was likewise answered

by general denial. The court found against appellant upon her complaint that she was not entitled to a decree for divorce, and found for the appellee upon his cross-complaint that he was entitled to a divorce on the grounds therein alleged. The court also found that the appellee was "the owner in his own name and right" of certain personal property "used by said parties in common," which property is particularly set out, and that the appellant was the owner and entitled to the possession of all "other personal property used by said parties in common at the time of their separation" and not included in that designated as property owned by appellee, which property is also particularly identified and described in the finding.

Upon this finding the court adjudged that the appellee was entitled to a divorce from appellant, and that he was the absolute owner and entitled to possession of the following personal property: (Here the decree sets out and describes the personal property set out in the finding as belonging to appellee.) The court also adjudged that the appellant was the owner of the remaining personal property used by the parties in common, not included in that adjudged to be owned by appellee, consisting of, etc.: (Here appellant's property as set out in the finding is again set out and described.)

A motion for new trial filed by appellant was overruled, and this ruling is assigned as error and relied on for reversal. This motion contains but two grounds, viz.: (1) That the decision is not sustained by sufficient evidence; and (2) that the decision is contrary to law.

Appellant challenges only that part of the judg-

ment appealed from which attempts to adjudicate the property rights between her and her divorced husband. It is contended that such part of the judgment is not sustained by sufficient evidence and is contrary to law.

In support of this contention appellant asserts in effect that neither the complaint nor the cross-complaint tenders any issue as to the ownership of the property; that the only issues tendered are those of divorce, alimony, and the custody of the children; that in a divorce decree the court may "adjudicate all property rights between husband and wife so far as community property is concerned;" but that the court has no power or authority to extend such adjudication so as to in any way affect individual property of the wife; that the judgment in the instant case attempted to adjudicate individual property by dividing the personal property between appellant and appellee, and hence that the decision, in so far as it affects such property, is contrary to law.

The evidence is not in the record, and hence the first ground of the motion for new trial cannot

1. be considered. Assuming, however, without so holding, that the question which appellant seeks to present is properly presented by the second ground of said motion, appellant is not supported in her contention that the judgment is outside of the issues.

The cross-complaint contains substantially the following averments, among others: Appellant and appellee had been contemplating moving to the

2. State of Nebraska to live. Appellant represented to appellee that her father had promised her that, if they would move upon 120 acres of

land and improve it as their home, he would deed it to them. They moved upon this farm, which, at that time, was not productive. The buildings thereon were small and cheaply constructed, the fencing poor and out of repair, and the farm contained no tiling. Appellee and appellant, relying on the representations of appellant's father, remained on said farm until the day of their separation, except for a period of two years. During the period they lived on said farm appellee inherited from his parents \$1,400, which he invested in improvements upon the land, relying upon the promises before indicated. He also cleared the woodland and placed more than 100 acres in a good state of cultivation, rebuilt the house and made it a modern home, with all modern improvements, including a furnace, toilet, bathroom and lighting system. He built a new barn, 40x60 feet, with 20-foot posts, the same being a banked barn, with modern conveniences therein. He constructed more than four miles of good tile drain, put an orchard, shade trees, new silo, windmill and pump upon said premises, and built an addition to the old barn, two sheds and additions thereto, and fenced said farm complete with a new rail fence, and has since constructed more than 400 rods of new wire fence, all at a cost and investment of more than \$15,000. During said period he farmed other lands, from which he earned more than \$5,000, *which he invested in stock and personal property on said premises.* That appellant's father failed to execute said deed to said land according to his promise, died testate, leaving said premises to the appellant, to have and to hold during her life, after which it was to go to the children of appellant and appellee. That by reason of the matters and things set out

the appellant consented that appellee should continue to live upon said premises with his family and farm the same as he had been doing, and promised him that he should have the right to buy and pay for forty acres of land from the proceeds of said farm. That *all the personal property produced and kept upon said premises should be appellee's*, and he was authorized to buy all the stock that he could carry and keep on said farm. That by such agreement appellant encouraged appellee to continue to improve her premises as aforesaid, and to invest all of his property and means on said premises and the improvements thereof, *except the stock and personal property which was on said premises at the time of the separation*. Averments then follow showing appellant's refusal to longer live with appellee, and that, to avoid any publicity and humiliation to themselves and their children, they entered into an agreement adjusting their property rights, which was written and prepared by appellant's attorney, and is set out and made a part of the cross-complaint. By this agreement it appears that appellant was to have the care and custody of the two minor children, without any allowance for support, and no alimony should be asked for by her, and, if granted by the court, should be fully satisfied without payment thereof by cross-complainant. That the appellant should pay her own attorney's fee. It was further agreed that *appellee should have all the personal property, except certain items particularly mentioned*, and that appellant would reimburse him for his patrimony of \$1,400, which he had invested in said farm, by paying such amount to him in money. The agreement sets out other expenses for which it was agreed that appellee should be reimbursed, which

we deem it unnecessary to indicate. Appellee asked that he be granted a divorce, *and that his property rights be ascertained and adjudicated.*

Appellant cites in support of her contention, *supra*, *State, ex rel. v. Parrish* (1890), 1 Ind. App. 441, 27 N. E. 652, and *Fredericks v. Sault* (1897), 19 Ind. App. 604, 49 N. E. 909. The first case merely holds that separate property of the wife is not affected to her injury by a decree of divorce. (See also cases there cited.) The second case is to the effect that in a suit for divorce evidence of the wife's separate property is proper to be considered for the purpose only of aiding the court in determining what would be a fair allowance for alimony for the wife out of the husband's property, and that her separate property is not affected by said divorce. These cases are not of controlling influence on the question here attempted to be presented. Nothing appears from the judgment involved purporting to affect the individual property of appellant. On the contrary, the finding and judgment purports to deal with and adjudicate the rights of the parties in "personal property used by them in common at the time of their separation." As before stated, the evidence is not in the record, and every presumption as to what it may have shown must be indulged in favor of the decision of the trial court.

It is well settled in this state that in a divorce proceeding in which the court has acquired jurisdiction of the subject-matter and the parties, such

3. court has the power to, and, in case a divorce is decreed, in fact does, adjudicate between the divorced parties "all property rights * * * growing out of, or connected with, the marriage." *Walker*

Hughes, Admr., v. Patton, Auditor—67 Ind. App. 855.

v. *Walker* (1897), 150 Ind. 317, 322, 328, 50 N. E. 68, and cases there cited; *Murray v. Murray* (1899), 153 Ind. 14, 53 N. E. 946.

The averments of the cross-complaint set out *supra*, especially those italicized, clearly tendered an issue

affecting personal property rights of said parties

4. ties "growing out of and connected with said marriage." The adjudication of the rights of

the parties in and to such property was therefore clearly within the issues tendered, and it was not only

within the authority and power of the court to adjudicate and settle the rights of the parties in and to such

property, but it was its duty to do so, and, in the absence of the evidence in this case, this court will

presume that it was the rights of the parties in and to such property that are referred to and adjudicated in

said judgment.

No error being shown by appellant, the judgment below is affirmed.

NOTE.—Reported in 119 N. E. 501. See under (1) 4 C. J. 550, 784; (2) 14 Cyc 719; (3) 14 Cyc 712.

HUGHES, ADMINISTRATOR, v. PATTON, AUDITOR.

[No. 9,773. Filed November 29, 1916. Rehearing denied March 30, 1917. Transfer denied May 5, 1918.]

APPEAL.—Decisions Reviewable.—*"Final Judgment."*—*Executors and Administrators.*—An order by the court that an administrator of an estate be not discharged, that the final report be not approved, and that the county auditor prosecute a claim for omitted taxes on the personal estate as described in the exceptions to the final report filed by such auditor, is not a "final judgment" from which an appeal will lie within the meaning of §671 Burns 1914, §632 R. S. 1881.

Hughes, Admr., v. Patton, Auditor—67 Ind. App. 655.

From Marion Probate Court (9,757); *Mahlon E. Bash*, Judge.

Charles F. Hughes filed final report as administrator, to which William T. Patton, auditor of Marion county, filed objections. From an order denying approval of the report, the administrator appeals. *Appeal dismissed.*

Bachelder & Bachelder, for appellant.

Frank T. Brown and *Joseph W. Hutchinson*, for appellee.

HOTTEL, J.—On January 12, 1914, Charles F. Hughes, administrator *de bonis non*, of the estate of Lovina Streight, deceased, filed his final report, in which he showed a total of receipts and disbursements, leaving a balance of \$19,017.16, of which amount he represented that \$5,705.14 should be paid to certain attorneys named, and the balance distributed among certain named heirs, in the amounts therein set out. On February 7, 1914, William T. Patton, auditor of Marion county, filed objection to this report, in which he alleged that "said estate is indebted to the State of Indiana, county of Marion, city of Indianapolis, and Center township for omitted taxes which said Lovina Streight omitted and failed to return on her schedule of taxes to the township assessor or the proper authorities as follows." Here follows certain notes owned by deceased which she had omitted from her schedule of taxes. Notice to the administrator of such omission, and his failure to appear before such auditor, is alleged, with a statement that such auditor is credibly informed and believes that said estate owes taxes amounting to \$1,181.69, and a prayer that the court withhold the

approval of said report until steps could be effected whereby such taxes could be collected off of said estate.

Thereupon, to wit, on February 13, 1914, the administrator filed a report, showing a distribution of the balance in his hands to the persons shown in his first report to be entitled thereto, accompanied by the receipts of such distributees. On March 27, such administrator filed a demurrer to said exceptions to his report, which was overruled. On April 7, 1914, said matter was submitted to the court for trial, with a request by said administrator for a special finding of facts and conclusions of law.

In its finding, the court found the condition of the estate to be substantially as set out in the administrator's report, and also found that the deceased omitted from her schedule of taxes in the years named the notes set out in the exceptions to said report, and that their amount in value had not been placed on the tax duplicates of Marion county as omitted property of the deceased, and that the final report of said administrator had never been approved. Upon this finding the court stated, as a conclusion of law, that said final report should not be approved nor the administrator discharged, that the estate should be kept open, and said auditor be permitted to prosecute said claim for taxes.

Upon such finding and conclusion of law the court entered the following order, viz.: "It is thereupon adjudged and decreed by the court that the report in final settlement of said estate filed by the administrator, *de bonis non*, be not approved and that said administrator be not discharged, and that William T. Patton, auditor of Marion county, Indiana, prosecute

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the claim for taxes on the personal estate described in the exceptions to report in final settlement.”

From this order this appeal is prosecuted. The order indicated is not a final judgment from which an appeal will lie within the meaning of §671 Burns 1914, §632 R. S. 1881, as construed by the Supreme Court and this court. *Pfeiffer v. Crane, Gdn.* (1883), 89 Ind. 485; *Thiebaud v. Dufour* (1877), 57 Ind. 598; *Wood v. Wood* (1875), 51 Ind. 141; *Goodwin v. Goodwin, Exr.* (1874), 48 Ind. 584; *Angevine, Admr., v. Ward, Gdn.* (1879), 66 Ind. 460; *Leach v. Webb* (1916), 62 Ind. App. 693, 113 N. E. 311; *Mak-Saw-Ba Club v. Coffin* (1907), 169 Ind. 204, 210, 213, 82 N. E. 461, and cases there cited.

The appeal is therefore dismissed.

ON PETITION FOR REHEARING.

HOTTEL, J.—In a petition for rehearing in this case the appellant insists that this court erred in its opinion dismissing the appeal, and the grounds upon which he predicates error as stated in his petition are substantially the same as those indicated and disposed of in an opinion by this court on rehearing in the case of *Stout v. Stout, Admr.* (1918), 68 Ind. App. 278, 114 N. E. 473, 115 N. E. 594.

For the reasons indicated in that opinion, the petition for rehearing in this case is overruled.

NOTE.—Reported in 114 N. E. 224, 115 N. E. 596.

GAUMER v. REGISTER PUBLISHING COMPANY ET AL.

[No. 9,564. Filed May 28, 1918.]

1. CHATTEL MORTGAGES.—*Failure to Record in Time.—Transfer of Property.—Estoppel.*—In an action by the assignee of a chattel mortgage against the purchaser of the mortgaged property, a complaint alleging that, though the mortgage was not recorded within ten days, it was recorded, unreleased and unsatisfied at the time of the purchase and that the defendant recognized its validity by taking into consideration the amount secured by it as a part of the purchase price, was sufficient to overcome the rule that a chattel mortgage not recorded as required by §7472 Burns 1914, Acts 1897 p. 240, is *prima facie* void as to third parties, with or without notice; since, under such a showing, the defendant purchaser was estopped to deny the validity of the mortgage, and the property became the primary fund for the payment of the debt. pp. 660, 661, 663.
2. CHATTEL MORTGAGES.—*Recording.—Time.—Validity as to Assignee.*—A chattel mortgage not recorded within ten days, as required by §7472 Burns 1914, Acts 1897 p. 240, being valid as between the parties, is valid as between the mortgagor and an assignee of the mortgage. p. 660.

From Lake Superior Court; *Charles E. Greenwald*, Judge.

Action by Frank C. Gaumer against the Register Publishing Company and another. From a judgment for the defendants, the plaintiff appeals. *Reversed.*

Daniel B. Straley and *George E. Hershman*, for appellant.

Martin J. Smith, *Frank B. Pattee* and *Herbert T. Johnson*, for appellees.

CALDWELL, C. J.—Judgment was rendered against appellant by reason of his refusal to plead over on the sustaining of appellees' separate demurrers to his complaint. The substance of the complaint was as follows: On December 2, 1912, Collins executed to

Davison four promissory notes of that date, each in the sum of \$500, maturing November 1, 1914, 1915, 1916 and 1917 respectively. On the same date, to secure the payment of the notes, Collins executed to Davison a chattel mortgage on a certain printing outfit and newspaper plant located at Crown Point, Lake county. Under a certain provision of the mortgage all the notes were due by reason of the failure to pay certain of them at maturity. The mortgage was recorded in the proper county on December 17, 1912, fifteen days after its execution. Appellant is the owner of the notes and mortgage by virtue of certain assignments and indorsements. Appellee company is the owner of the property mortgaged by virtue of a purchase. Appellee Bibler is made a defendant by reason of a certain mortgage standing unreleased of record in her name, alleged to be paid and satisfied. Prayer for judgment in the sum of \$2,500 and the foreclosure of the mortgage.

The allegation of the complaint on which appellant relies in support of his assignment that the court erred in sustaining the demurrers is as follows: "That the Register Publishing Company, one of the defendants herein, did not purchase and did not become the owner of said property until on or about the — day of May, 1914, and that said mortgage was on record and unreleased and unsatisfied at that time, and that the said defendant Register Publishing Company at the time of purchasing said property took into consideration the indebtedness secured by said mortgage as a part of the purchase price for said property and acknowledged said mortgage as a good, valid and existing lien on and against said property." It sufficiently appears that the property

mortgaged was not delivered to and retained by the mortgagee or his assigns.

The complaint contained certain allegations to the effect that the purchase of the mortgaged property by appellee company was not *bona fide*. Appellant's counsel stated in oral argument that no reliance was placed on such allegations, and we shall therefore assign to them no force or value.

Section 7472 Burns 1914, Acts 1897 p. 240, is to the effect that no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless the mortgage shall be properly acknowledged and recorded in the proper county within ten days after its execution.

The mortgage here was not recorded within ten days after its execution. The parties to the mortgage at the time of its execution were Collins

1. and Davison. The mortgage not having been recorded within the time fixed by the statute, while valid as between Collins and Davison, was at least *prima facie* void as to appellees here, regardless of whether they had notice of its existence, actual or constructive. *Stengel v. Boyce* (1896), 143 Ind. 642, 42 N. E. 905; *Ross v. Menefee* (1890), 125 Ind. 432, 25 N. E. 545; *Guyer v. Union Trust Co.* (1913), 55 Ind. App. 472, 104 N. E. 82; *Wolf v. Russell* (1913), 55 Ind. App. 660, 104 N. E. 603.

We proceed to determine whether the rule announced by these decisions governs here. The special circumstances disclosed by the complaint are as

2. follows: Collins was indebted to Davison in the sum of \$2,000 and interest, as represented

by the notes. Davison held a mortgage against Collins' property to secure the notes. As between them the mortgage was valid, although not recorded within ten days after its execution. The notes and mortgage were assigned to appellant by Davison. By the transfer of the notes Collins became indebted to appellant rather than Davison, in the sum thereby represented. As appellant was Davison's assignee, the chattel mortgage was valid as between the former and Collins. *Reynolds v. Quick* (1891), 128 Ind. 316, 27 N. E. 621; *Warner v. Warner* (1902), 30 Ind. App. 578, 586, 66 N. E. 760.

Such being the situation, appellee publishing company purchased the mortgaged property of Collins.

While negotiating the purchase it knew or dis-

1. covered the existence of the mortgage. It thereupon acknowledged the validity of the mortgage and recognized that the sum thereby secured must be paid. Having agreed with Collins respecting the value of the property, and the amount of the purchase price thereof, Collins and the company further agreed that the amount secured by the mortgage should be deducted from the agreed purchase price, and that only the balance should be paid, which was accordingly done; that is, if the agreed purchase price was \$5,000, something more than \$2,000 was deducted therefrom by reason of the mortgage, treated as valid, and only the balance or something less than \$3,000 was paid. The facts as alleged do not amount to an express promise by the publishing company to pay and discharge the notes. Perhaps they do not amount to an unconditional implied promise to do so. It seems to us apparent, however, that Collins and the publishing company thereby con-

templated that, as between them, the mortgaged property should at least constitute the primary fund for the payment of the notes, the alternative being the payment of the latter by the company. At any event Collins, while he has paid the notes as between him and the company, is not discharged of liability thereon as between him and appellant. The company, having received the full value of the notes by acknowledging and treating the mortgage as valid, now, while retaining such value, declares that the mortgage is void, and asks this court in its behalf to declare it so. The foregoing indicates our interpretation of the complaint. Under such circumstances may the publishing company be heard to say that the mortgage is invalid? In considering this question it should be remembered that the mortgage here is not a nullity. It was a valid instrument as between the parties. If invalid as presented here, it is invalid only as against the party who acknowledged its validity and on such acknowledgment received and retains the full sum by it secured.

On the involved subject the following is stated in Jones on Chattel Mortgages (5th ed.) §487: "One who has purchased property subject to a mortgage, so that the amount of the mortgage forms a part of the consideration of the purchase, cannot deny its validity." The author in a note to such section refers to his work on mortgages (§§735-770) for a further discussion of the subject, and states that the rights and liabilities of one who purchases subject to a mortgage are for the most part the same whether the property be real or personal. In his work on mortgages (Vol. 2, §736 [7th ed.]) the author states: "The amount of an existing mortgage having been deducted

from the purchase money of the incumbered property, the grantee in effect undertakes to pay the amount of the purchase money represented by the mortgage to the holder of it, and he is as effectually estopped to deny its validity as he would be had he in terms agreed to pay such mortgage." See, also, 2 Jones, *Chattel Mortgages* (7th ed.) §744; *U. S. Bond, etc., Co. v. Keahey* (1916), 53 Okla. 176, 155 Pac. 557, L. R. A. 1917C 829; *Johnson v. Thompson* (1880), 129 Mass. 398; *Fuller & Co. v. Hunt* (1878), 48 Iowa 163; *Kellogg v. Secord* (1879), 42 Mich. 318, 3 N. W. 868; *Russell v. Allen* (1843), 10 Paige Ch. (N. Y.) 249; *Pinnell v. Boyd* (1880), 33 N. J. Eq. 190; 2 Cobbey, *Chattel Mortgages* §632. In the *Keahey* case, *supra*, the court said of a similar situation: "In theory he (the purchaser) has deducted the amount of the mortgage from the purchase price, and it would clearly be inequitable to allow him to urge the invalidity of the mortgage, and retain the amount thereof, which was in effect furnished by his grantor, and not apply it to the discharge of the mortgage."

Here the mortgage was valid as between Collins and Davison and his assigns. Collins' liability on the notes is not questioned. He remains liable

1. thereon as between him and appellant. It is expressly alleged that when appellee purchased the property it took into consideration the indebtedness secured by the mortgage as a part of the purchase price and acknowledged the validity of the mortgage. Under such circumstances this case comes easily within the authorities not only that the company may not be heard to contest the validity of the mortgage, but also that the mortgaged property thereby became the primary fund for the payment of the

mortgage debt. See the following: *Gregory v. Arms* (1911), 48 Ind. App. 562, 96 N. E. 196, and cases; *Bunch v. Grave* (1887), 111 Ind. 351, 355, 12 N. E. 514; *Hancock v. Fleming* (1885), 103 Ind. 533, 3 N. E. 254; *Atherton v. Toney* (1873), 43 Ind. 211; *Durham v. Craig* (1881), 79 Ind. 117; *United States Bond, etc., Co. v. Keahey*, L. R. A. 1917C, *supra*, note; *Rice v. Sanders* (1890), 8 L. R. A., note 316; 27 Cyc 1342 *et seq*; 11 C. J. 633. We conclude that the complaint states a cause of action against appellee company. It results also that it is good as against appellee Bibler.

Judgment reversed, with instructions to overrule each demurrer filed to the complaint and for further proceedings in harmony with this opinion, and with permission to reform the pleadings if desired.

NOTE.—Reported in 119 N. E. 728.

PATTON v. COOPER, ADMINISTRATOR.

[No. 9,521. Filed March 21, 1918. Rehearing denied May 28, 1918.]

1. **APPEAL.—Review.—Witnesses.—Credibility.—Jury Question.**—The credibility of witnesses and the weight to be given their testimony are questions for the jury, and not for the court on appeal. p. 666.
2. **APPEAL.—Evidence.—Weight.—Jury Question.**—The court on appeal will not weigh conflicting evidence, the question being for the jury to determine. p. 667.
3. **EXECUTORS AND ADMINISTRATORS.—Action.—Evidence.—Sufficiency.—Review.**—Where a claim was filed against a decedent's estate on the theory that the decedent received and held a certain sum of money in trust which, after the payment of the donor's funeral expenses, was to be paid to the claimant, there could be no recovery under evidence showing only the receipt of the money by the decedent and the payment of the funeral expenses, without establishing the amount of such expenses, since a

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verdict, in the absence of such evidence, could be returned only by conjecture as to the amount of the deduction for such expenses, and this the jury is not permitted to do. p. 667.

From Washington Circuit Court; *Emmet C. Mitchell*, Special Judge.

Action by Felix Cooper against Charles S. Patton, administrator of the estate of Lemuel Cooper. From a judgment for the plaintiff, the defendant appeals. *Reversed.*

Wilber W. Hottel and *Arthur McCart*, for appellant.

Asa Elliott and *Frank S. Houston*, for appellee.

IBACH, C. J.—On February 18, 1913, appellee filed against the estate of Lemuel Cooper, deceased, the following claim:

“Estate of Lemuel Cooper Deceased.

In account with Felix Cooper, Dr.

May 17, 1902.

To \$1500.00 held in trust by said decedent received from Marion Cooper, for the use and benefit of claimant

\$1500.00

Interest on same

950.00

\$2400.00

(Here follows verification as required by statute.)”

The claim was transferred to the issue docket, where upon the issues joined by statute the cause was tried by jury, and a verdict was returned in favor of appellee for \$650.

Appellant has assigned as error the overruling of his motion for a new trial, and particularly relies on

the ground thereof that the verdict of the jury is contrary to law.

Appellant contends in effect that there is no evidence which would warrant the amount of the verdict returned by the jury; that according to appellee's theory a specific amount of money was left with decedent, out of which he was to first pay the donor's funeral expenses and the balance was then to be turned over to appellee; and that there is no evidence whatever as to what the amount of the funeral expenses were.

Without setting out the evidence in detail, we find that the uncontradicted evidence shows that, whatever was to be done with the money, if any, left with decedent by Marion Cooper, the donor's funeral expenses were to be first paid out of it. Marion Cooper and the decedent were full brothers, and appellee was a half-brother. Marion Cooper died on May 17, 1902, and decedent died on December 29, 1912. A brother of appellee testified that he was at the home of decedent, Lemuel Cooper, shortly before the death of Marion Cooper, and there in the presence of said witness and one James Fiancher saw Marion Cooper give his brother Lemuel the sum of \$1,600, \$1,100 of which was in gold and \$500 in paper, and heard him request Lemuel to pay his funeral expenses and give the remainder of said money to appellee. This testimony was corroborated by other witnesses.

A great deal of impeaching evidence was introduced, but with that we are not concerned as the credibility of the witnesses and the weight to

1. be given their testimony were questions for the jury. Neither will this court weigh con-

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- flicting evidence, for that likewise was a question for the jury. *Barr v. Sumner* (1915), 183 Ind. 402, 107 N. E. 675, 109 N. E. 193.

It must be apparent, however, from the facts stated that, before a court or jury could determine how much was due appellee according to his own

3. theory of the trust, there must be some evidence as to the amount of the funeral expenses. There is evidence that they were paid by decedent, but none from which any amount could be inferred. The jury, in determining their verdict, could reach the amount returned only by conjecture as to what deductions should be made for such expenses. This they were not permitted to do. *Johnson v. Brady* (1915), 60 Ind. App. 556, 109 N. E. 230; *Pittsburgh, etc., R. Co. v. Vance* (1914), 58 Ind. App. 1, 108 N. E. 158. The verdict is therefore contrary to law, and appellant's motion for a new trial upon such ground should have been sustained.

Judgment reversed, with instructions to grant appellant's motion for a new trial.

Hottel, J., not participating.

NOTE.—Reported in 119 N. E. 31.

BRANNUM-KEENE LUMBER COMPANY v. COLE ET AL.

[No. 9,582. Filed May 28, 1918.]

1. **MECHANICS' LIENS.**—*Notice.*—*Description.*—*Extrinsic Evidence.*—Imperfect and inaccurate descriptions of property in a mechanic's lien notice may be aided by extrinsic evidence where proper averments appear in the complaint, and any description in such notice is sufficiently certain if the land described can be

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identified from it, or any reference therein, when aided by such evidence. p. 672.

2. **MECHANICS' LIENS.**—*Notice.*—*Description.*—*Certainty.*—In an action to foreclose a mechanic's lien, where the rights of third parties were not involved, a complaint which set forth a notice of a mechanic's lien which showed the section, township, range, county, the acreage, the nature of the building erected thereon and the uses to which it was put, and which further alleged that the land on which the building was constructed was the only land owned by the defendant in that section and that such building was the only building thereon, was sufficient as against a demurrer for want of facts on the ground that the description contained in the notice was not sufficiently certain to permit introduction of extrinsic evidence, the allegations as to description being sufficient to raise a question of fact. p. 673.
3. **MECHANICS' LIENS.**—*Notice.*—*Description.*—*Statute.*—*Construction.*—Where the only point in dispute between a materialman and the owner of property is relative to the description of the property contained in a mechanic's lien, the statute, §8297 Burns 1914, Acts 1909 p. 295, §3, is to be liberally construed. p. 673.

From Marion Superior Court (100,150); *Linn D. Hay*, Judge.

Action by the Brannum-Keene Lumber Company against Ruth Schuyler Cole and another. From a judgment for the defendants, the plaintiff appeals. *Reversed.*

William A. Pickens, Linton A. Cox and Earl R. Conder, for appellant.

Whitcomb & Dowden, for appellees.

IBACH, C. J.—Suit by appellant against appellees. The complaint avers: The plaintiff in the above entitled cause complains of the defendants, and each of them, and for cause of action says that on April 8, 1914, the defendant Ruth Schuyler Cole was the owner of a part of the east half of section 2, township 16 north, range 3 east, in Marion county, more particularly described as follows: Beginning at a

point which is south 11 degrees and 35 minutes west, 156.7 feet from a point on the north line of the south-east quarter of said section 492.65 feet of the center of said section 2; thence south 11 degrees and 35 minutes west, 812 feet to a point; thence south 78 degrees and 25 minutes east, 335.8 feet to a point; thence south 47 degrees and 54 minutes east, 172.5 feet to a point; thence north 73 degrees and 39 minutes east 187.05 feet to a point; thence south 78 degrees and 25 minutes east, 800 feet to the west bank of White river; thence along the west bank of White river 1065.65 feet to a point, thence north 79 degrees and 32 minutes west, 1300 feet to a point; thence south 11 degrees and 35 minutes west to the place of beginning; that the land so described includes and is in fact the land referred to in said notice of lien heretofore filed and hereinafter specifically set out; that the defendants do not own other land than that first herein described; that the garage herein mentioned was erected on said land and is the only building erected by the defendants on the land owned by them and first herein described. It is then averred that on January 27, 1915, by proper conveyance appellees conveyed such lands to a third party, who in turn on the 29th day of the same month conveyed the same lands to appellees, thereby vesting the title in them as husband and wife, and that they now hold the same as tenants by the entirety. On April 8, 1914, defendant Albert M. Cole entered into a written contract with William Grepp for the construction of a two-story garage on the above described real estate, and that defendant Ruth had knowledge of the execution of said contract, and did consent to and authorize the execution of the same, and while the

garage was being erected she had knowledge thereof, and made no objection thereto, but did consent to and authorize the erection of the garage on the said real estate. Said Grepp was not a dealer in building materials, and defendants knew that he would be obliged to purchase all necessary materials for the building from persons dealing therein. On the — day of April, 1914, said Grepp contracted with appellants, a copy of which contract is made a part of the complaint, for the furnishing of the materials for use, and to be used, in the erection of said garage to be erected on the above described real estate, and pursuant to said agreement the appellant did furnish for use in said building goods and merchandise to the amount of \$764.59, a bill of particulars of which is also filed with the complaint, and that all of said materials were actually used in the construction of said building on said real estate.

A copy of the notice is made a part of the complaint, and, omitting names, is as follows:

“You are hereby notified that Brannum-Keene Lumber Company intends to hold a mechanics’ lien on west of White river north part commencing 156.70 feet south and 492.65 feet east of the northwest corner of the southeast quarter section two, township sixteen, range three, Washington township, Marion county, Indiana, containing 36.74 acres, more or less, as well as upon the dwelling and garage recently erected thereon by you for the sum of eight hundred dollars for work and labor done and materials furnished by us in the erection and construction of said house which work and labor done and materials furnished was done and furnished at your special

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instance and request and within the last sixty days.

“Brannum-Keene Lumber Co.,
By Wm. U. Kingston Att’y.”

The notice is shown to have been duly recorded on September 28, 1914. The amount due has not been paid, for which sum and attorney’s fees a judgment is demanded and a foreclosure of the lien to satisfy the same.

To this complaint the defendants separately and severally demurred, the ground of the demurrer being that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained and judgment rendered against appellant. It was appellees’ contention in the court below, and it is here contended in support of the judgment, that the description of the land intended to be covered in the notice of lien is not sufficiently certain to authorize the description to be “designated, improved or supplied by extrinsic evidence.”

Admitting that the notice is inaccurate, is the description of the land so defective that it cannot be identified?

The legislature of 1883, for the evident purpose of relieving the apparent strictness of our mechanic’s lien statute, as it then existed, with reference to the description of the lands improved by mechanics and materialmen, passed the following amendment: “Any description of the lot or land in a notice of a lien will be sufficient, if from such description or any reference therein, the lot or land can be identified.” §8297 Burns 1914, Acts 1909 p. 295, §3.

Since this amendment our courts have uniformly

held that imperfect and inaccurate descriptions of property in a mechanics' lien notice may be

1. aided by extrinsic evidence where proper averments are found in the complaint, and any description of the land in a notice of lien will be sufficiently certain, if from such description, or any reference therein, aided by extrinsic evidence the lot or land can be identified. *Deal v. Plass* (1915), 59 Ind. App. 185, 109 N. E. 51; *Coburn v. Stephens* (1894), 137 Ind. 683, 36 N. E. 132, 45 Am. St. 218; *McNamee v. Rauck* (1891), 128 Ind. 59, 27 N. E. 423. The character of the building and its intended use may be given in evidence to identify the lands mentioned in the notice of lien.

In *Hillyard v. Robbins* (1912), 53 Ind. App. 107, 101 N. E. 341, this court said: "It has been expressly held that where the notice refers to a dwelling house, the identification of the building may be used as a means of correcting the description and of showing that no other property answers the description." And in *McNamee v. Rauck*, *supra*, the Supreme Court said: "By rejecting then the false description, we have the lands described by township, range and county. This would not be a sufficient description, but the statute says that if from "any reference" in the notice the land can be identified it will be sufficient. The notice refers to the land, upon which the lien was to be held, as that upon which the house was situate which was built by the appellant for the owner at her request, * * *. It appears also from the complaint that no other property answers the description in the notice, which is said to aid what might otherwise be an insufficient description. * * * We

are of the opinion that, as against the appellants, the notice, when taken in connection with the extrinsic facts averred in the complaint, was sufficient to create a lien.”

The averments of the complaint under consideration show the controversy to be solely between the owners of the lands improved and the material-

2. men. The rights of third parties relying upon the record of the notice are not involved. The section, township, range and county are cer-
3. tain and definite, as is also the nature of the structure and the uses to which it was to be put. The acreage is certain and the name of the owners, and the facts are also averred that the land on which the building was erected was the only land owned by the appellees in that section, and that such building was the only building erected thereon. There is no dispute upon the proposition that appellant comes within the provisions of the mechanics' lien statute, so that the whole controversy is over the description of the premises. In such cases the statute is to be liberally construed to accomplish the objects and purposes intended by it, which is to grant such a claimant the benefits to which he is entitled thereunder. Therefore the principles of law announced and the authorities cited *supra*, where they have been considered, warrant us in holding that there is enough in the descriptions to enable one who is familiar with the locality to identify the property intended to be described with reasonable certainty. At least, there is enough to require the court to determine the question as one of fact rather than one of law. This is specially true in this case because it is further pleaded

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as a fact that the land described in the notice and that described in the complaint is the same.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

NOTE.—Reported in 119 N. E. 721. Failure of description of land in affidavit of claim, effect, 62 L. R. A. 382.

SHAY v. GOINS ET AL.

[No. 9,623. Filed May 28, 1918.]

1. *APPEAL.—Ruling on Demurrer.—Waiver.—Briefs.*—An assignment of error that the court erred in overruling a demurrer to the complaint is waived where the appellant fails to set out in his brief either the complaint or the demurrer, or to state any proposition indicating wherein the complaint is insufficient. p. 675.
2. *APPEAL.—Briefs.—Evidence.—Waiver.*—In an appeal in an action for possession of real estate, where the appellant defendant failed to set out in his briefs the motion for new trial or its substance, or to show that any exception was taken to the ruling on such motion, and failed to set out a condensed recital of the evidence or a written lease, or its substance, relied upon as a defense, the brief not purporting to state the substance of the evidence, but announced only conclusions of counsel as to the effect of the testimony of the witnesses, and failed to mention some of the witnesses or to set out any of their testimony, any question depending on a consideration of the evidence was thereby waived. p. 675.
3. *APPEAL.—Briefs.*—It is the appellant's duty to present by his briefs facts from the record relied upon to show error, as the court on appeal will not search the record to reverse, though it may, and generally will, do so in order to affirm the judgment of the lower court. p. 676.
4. *APPEAL.—Presumptions.*—Every reasonable presumption is indulged in favor of the rulings of the trial court. p. 676.

From Tipton Circuit Court; *James M. Purvis*, Judge.

Shay v. Goins—67 Ind. App. 674.

Action by George W. Goins and others against James Shay. From a judgment for the plaintiffs, the defendant appeals. *Affirmed.*

Herman F. Wilkie, Robert Wilkie and Wendell Wilkie, for appellant.

Gifford & Gifford, for appellees.

FELT, J.—Appellees brought this suit against appellant for possession of certain real estate in Tipton county, Indiana. The complaint was answered by a general denial. Appellees recovered judgment for the possession of the real estate and damages in the sum of one dollar. Appellant has assigned as error the overruling of his demurrer to the complaint and the overruling of his motion for a new trial.

Appellant has not set out the complaint nor his demurrer thereto in his brief, nor has he stated any point or proposition indicating wherein the

1. complaint is insufficient. Any error in the ruling on the demurrer is therefore waived.

Cleveland, etc., R. Co. v. Bowen (1912), 179 Ind. 142, 144, 146, 100 N. E. 465; *Schlosser v. Schlosser* (1915), 183 Ind. 659, 110 N. E. 66; *Christie v. Slininger* (1915), 183 Ind. 658, 110 N. E. 61.

Neither the motion for a new trial nor the substance thereof is set out in appellant's briefs. The briefs do not indicate the causes, if any, assigned for a new trial, nor do they show that any excep-

2. tion was taken to the ruling of the court thereon. Neither do they contain "a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely," as required by clause 5 of Rule 22 of the Supreme and Appellate Courts. The briefs indicate that there was a written lease and extension thereof in writing, but neither

the lease nor the substance thereof is shown in appellant's briefs. The same is true of the alleged extension of the lease.

Appellant's reference to the evidence is very meager, and, with few exceptions, the briefs do not purport to state the substance of the evidence, but announce the conclusions of the attorney as to the effect of the testimony of the witnesses. No mention is made of some of the witnesses nor of their testimony, and no portion of their evidence is set out in the briefs. Appellant has thereby waived any question, the determination of which depends upon an examination of the evidence in the case. †

It is the duty of an appellant to present by his briefs the facts from the record and proceedings of the trial court relied upon to show error. Every

3. reasonable presumption is indulged in favor of the correctness of the rulings of the trial court. On appeal the court will not search the
4. record to reverse, though it may, and generally will, do so in order to affirm the judgment of the lower court. Appellant has failed to present any error entitling him to a reversal of the judgment from which he has appealed. *Ireland v. Huffman* (1909), 172 Ind. 278, 88 N. E. 508; *Harrold v. Whistler* (1905), 60 Ind. App. 504, 111 N. E. 79; *Bradley v. Onstott* (1913), 180 Ind. 687, 689, 103 N. E. 798; *Cleveland, etc., R. Co. v. Bowen, supra*; *Johnson v. Bebout* (1915), 59 Ind. App. 159, 108 N. E. 967; *Zink v. Zink* (1914), 56 Ind. App. 677, 678, 106 N. E. 381; *Cleveland, etc., R. Co. v. Beard* (1912), 52 Ind. App. 105, 107, 100 N. E. 392.

Judgment affirmed.

NOTE.—Reported in 119 N. E. 808.

Krieg v. Palmer Nat. Bank—67 Ind. App. 677.

KRIEG ET AL. v. PALMER NATIONAL BANK.

[No. 8,790. Filed January 13, 1916. Rehearing denied April 20, 1916. Transfer denied April 3, 1918. Motion to withdraw denial of transfer overruled May 29, 1918.]

1. **APPEAL.—Assignments of Error.—Sufficiency.—Questions Presented.**—An assignment of error questioning jointly the sustaining of a demurrer to all the special replies to special answers to a cross-complaint presents no question for review where the record shows no such ruling, but, instead shows the sustaining of separate demurrers to certain paragraphs of reply. p. 681.
2. **APPEAL.—Record.—Questions Presented for Review.**—An assignment of error questioning the sustaining of a demurrer presents no question for review where the demurrer is not in the record. p. 681.
3. **APPEAL.—Review.—Law of the Case.**—An opinion on a former appeal is the law of the case as to all questions presented and decided. p. 682.
4. **APPEAL.—Review.—Harmless Error.—Law of the Case.**—The contention that a former opinion which was the law of the case should have been so construed as to permit a defendant to invoke the laws of a foreign state as a defense, is of no avail where the record shows that such defendant was permitted to plead, and offer in evidence, the laws of such state without objection, though the finding was against such defense. p. 682.
5. **BILLS AND NOTES.—Certificates of Deposit.—Transfer by Indorsement.**—An assignment of a certificate of deposit by unrestricted indorsement and delivery invests the holder with the legal title to the certificate and confers the right to recover thereon, unless such right is defeated by some equitable principle that may be invoked by the original payee to defeat such recovery. p. 685.
6. **BILLS AND NOTES.—Transfer by Indorsement.—Defenses.**—The nonnegotiability of an instrument under the law merchant does not affect its assignability, nor defeat the transfer of the legal title by indorsement and delivery, though certain defenses are available against it that are not available against the holder of an instrument negotiable by the law merchant. p. 685.
7. **BILLS AND NOTES.—Certificates of Deposit.—Transfer.—Bona Fide Purchaser.—Liability.**—Where the owner of a certificate of deposit, nonnegotiable under the law merchant, transferred it by unrestricted indorsement to a third person and the third

- person, though he acquired the certificate fraudulently, transferred it to the plaintiff in due course by unrestricted indorsement for a valuable consideration, the latter having no knowledge of prior equities or defenses and relying on the indorsement, the legal title to the certificate vested in the plaintiff, independently of its negotiability under the law merchant, and the owner must bear the loss and is estopped to deny the plaintiff's title, since he placed it within the power of the third person to work the injury. pp. 685, 692, 693.
8. **APPEAL.—Review.—Harmless Error.**—The overruling of a demurrer to the reply of the plaintiff holder of a certificate of deposit, assigned as error on the ground that the reply failed to allege an unrestricted indorsement by the owner, was harmless where the record shows that the indorsement was in due form and unrestricted. p. 693.
9. **BILLS AND NOTES.—Bona Fide Purchaser.—Verdict.—Special Interrogatories.—Conflict.**—In an action by the holder of a certificate of deposit, in which the defense relied on the fraud of a third party in acquiring the certificate from the original payee and the plaintiff relied on the pleading and proof of facts which it contends show it to be a *bona fide* purchaser, the answers to special interrogatories are reviewed and *held* not in conflict with the general verdict for the plaintiff. p. 694.
10. **APPEAL.—Review.—Instructions.**—Technical objections pointing out alleged defects to instructions that could not have affected any substantial rights of the appellants are of no avail. p. 695.
11. **APPEAL.—Review.—Presenting Grounds in Trial Court.—Modification of Judgment.**—Where neither defendant presented a motion to modify or change the judgment rendered in the plaintiff's favor by the trial court, no question as to the form of the judgment, nor as to the extent of the relief granted, is presented. p. 695.
12. **INTERPLEADER.—Rights of Interpleader.—Defenses.**—Where a bank which issued a certificate of deposit paid into court the amount due thereon, but thereafter participated as an active adversary with the payee, opposing recovery of any amount by the plaintiff holder, it waived the right to claim the benefits of interpleader and may not object to the recovery of a judgment for principal and interest from the date of demand to the time of trial, which was more than the amount paid into court, since an essential element of interpleader is that the party claiming the benefits thereof asserts no claim to the money so paid, nor to any interest in the controversy. p. 696.
13. **DEPOSITS IN COURT.—Effect.—Personal Judgment.**—In an action on a certificate of deposit, the original payee and indorser,

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who asked and was granted permission of being made a party defendant and denied the plaintiff's right to the recovery of money paid into court by the bank issuing the certificate, either from himself as indorser or from the bank as maker of the certificate, is liable for a personal judgment for the amount of the certificate from the date of demand to the time of trial. p. 696.

From the Wabash Circuit Court; *Nott N. Antrim*, Special Judge.

Action by the Palmer National Bank against George S. Krieg and another. From a judgment for the plaintiff, the defendants appeal. *Affirmed*.

Lesh & Lesh, F. O. Switzer, Krieg & Sapp and *W. A. Ketcham*, for appellants.

Watkins & Butler, for appellee.

FELT, P. J.—This is the second appeal in this case. *Krieg v. Palmer Nat. Bank*, 51 Ind. App. 34, 95 N. E. 613. The statement of the case in the former opinion is relied on as far as applicable to avoid repetition. Following the reversal of the judgment on the former appeal, the case was remanded to the lower court, where rulings were entered in conformity to the mandate of this court. An amended reply in three paragraphs by the Palmer National Bank was filed to the second, third, and fourth paragraphs of appellant Krieg's answer to the complaint. Appellee also filed an amended answer in three paragraphs to the cross-complaint of appellant Krieg, of which the third was a general denial. Appellant Krieg filed a reply in four paragraphs to the first paragraph of appellee's amended answer to the cross-complaint, and also filed a reply in four paragraphs addressed to the second paragraph of appellee's amended answer to the cross-complaint. The complaint and answers thereto and the cross-complaint are the same as on

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the former appeal. Demurrers by appellant Krieg for insufficiency of the facts alleged were overruled to the first and second paragraphs of the amended replies addressed to the second, third, and fourth paragraphs of appellant Krieg's answer to the complaint. The court also overruled appellant Krieg's separate demurrers to the first and second paragraphs of amended answer addressed to his cross-complaint. Appellee demurred separately to each the second, third, and fourth paragraphs of reply to the first paragraph of amended answer to the cross-complaint, which demurrer was sustained. Likewise the demurrer to the second, third, and fourth paragraphs of reply to the second paragraph of amended answer to the cross-complaint was sustained.

Separate errors are assigned by each of the appellants. Appellant Krieg assigns: (1) The overruling of his motion for new trial; (2) the overruling of his motion for judgment on the answers to the interrogatories; (3) overruling his demurrer separately and severally to the first and second paragraphs of appellee's amended reply to the second, third, and fourth paragraphs of his answer; (4) overruling his demurrer separately and severally to the first and second paragraphs of appellee's amended answer to his cross-complaint; (5) the sustaining of appellee's demurrer to the second, third, and fourth paragraphs of reply to the amended answer to the first and second paragraphs of the cross-complaint; (6) the sustaining of the demurrer of appellee to the second, third, and fourth paragraphs of reply to the second paragraph of the amended answer to the first and second paragraphs of the cross-complaint; (7) the overruling of his demurrer to the first paragraph of

appellee's amended reply to the second, third, and fourth paragraphs of his answer; (8) overruling his demurrer to the second paragraph of appellee's amended reply to the second, third, and fourth paragraphs of his answer; (9) overruling his demurrer to the first paragraph of appellee's amended answer to his cross-complaint; (10) overruling his demurrer to the second paragraph of appellee's amended answer to his cross-complaint. Appellant Huntington County Bank assigns as error the overruling of its motion for a new trial and its motion for judgment on the answers to the interrogatories.

The answer of appellee to the cross-complaint was in three paragraphs, of which the third was a general denial, and the first and second special answers. To each of the paragraphs of special answers there was filed a reply in four paragraphs, the first of which is a general denial.

The fifth assignment of error presents no question, for the reason that it seeks to question the sustaining of the demurrer to all the special re-

1. plies to all of the special answers to the cross-complaint jointly, while the record shows no such ruling, but, instead, shows separate and
2. several rulings of the court in sustaining separate demurrers to the second, third, and fourth paragraphs of reply to each of the first and second paragraphs of amended answer separately to the cross-complaint. Furthermore, the sixth assignment of errors presents no question, for the reason that the demurrer which is alleged to have been sustained is not in the record.

The decision on the former appeal is the law of the case as to all questions presented and decided, and

the opinion holds that the case is controlled by
3. the laws of Indiana, and not by the laws of Illinois, since Price, who indorsed the certificate in Illinois, is not a party to the suit.

It is contended, however, that, inasmuch as the mandate directed the overruling of the demurrer to the second paragraph of Krieg's reply to the

4. fourth paragraph of appellee's answer to the cross-complaint, the opinion must be construed to hold that Krieg may invoke the laws of Illinois in aid of his defense. We do not understand the ruling to be based upon that ground, but, if there is any ambiguity in the opinion or ground for appellant's contention, it appears from the record that appellant Krieg has not been harmed, for he was given the benefit of such construction and permitted to plead and offer in evidence the laws of Illinois without objection, and to fully try the issue on that theory, though it resulted in a finding against him. *Turpie v. Lowe* (1901), 158 Ind. 314, 318, 62 N. E. 484, 92 Am. St. 310.

Furthermore, as above indicated, the question is not presented by the assignment of errors, for the reasons already stated in regard to the fifth and sixth specifications of alleged error.

The assignments of error question the correctness of the trial court's action in overruling the separate demurrers to the first and second paragraphs of appellee's amended reply to the second, third, and fourth paragraphs of Krieg's answer to the complaint, and in overruling the separate demurrers to the first and second paragraphs of appellee's amended answer to the cross-complaint of appellant Krieg.

Appellee's amended first paragraph of reply to

each the second, third, and fourth paragraphs of Krieg's answer alleges in substance that appellee purchased the certificate of deposit sued on in the usual course of business at its place of business in Danville, Illinois, on March —, 1907, from James W. Price, who then had the same in his possession, claiming to own the certificate; that he then sold it to appellee as his property; that said Price indorsed and wrote his name across the back thereof, and then and there delivered it to appellee, for which it then and there gave him the sum of \$4,250 in currency, which he accepted; that appellant Krieg gave appellee no notice and did not make known his title or interest in and to said certificate, and appellee did not know, nor have knowledge or notice, that he claimed any interest therein, and did not know of any fraud in procuring the certificate from Krieg or the Huntington County Bank; that said Krieg had, at some previous time to appellee unknown, at Huntington, Indiana, written his name across the back of said certificate and delivered the same to said Price; that Krieg at said time knew his rights as to said certificate and that by his indorsement without restriction and delivery to said Price he invested him with the apparent legal title and ownership thereof; that, if there existed any defense to the payment of said certificate, Krieg did not disclose or make it known to appellee; that thereby appellee was led to purchase said certificate, and did purchase it, and paid for it the sum of \$4,250 in currency, believing from said unrestricted indorsement and the possession of the certificate by Price that he was the owner thereof; that appellee relied wholly upon said unrestricted indorsement and the possession aforesaid; that by reason of such un-

restricted indorsement and delivery, and by reason of appellee's reliance on the apparent ownership of Price, appellants are estopped from asserting any claim in or to said certificate as against appellee, or from asserting any fraud or illegality in the procurement thereof, and are thereby estopped from setting up fraud, or want or failure of consideration.

The second paragraph of amended reply to the second, third, and fourth paragraphs of answer of appellant Krieg, in substance, alleges that appellee purchased said certificate of deposit at its usual place of business at Danville, State of Illinois, in good faith in the usual course of business, without notice or knowledge of any defects therein, or of any fraud or illegality in the procurement thereof, before the certificate was due, and paid therefor to said Price, the holder thereof, the sum of \$4,250 in currency. The averments of the first paragraph of appellee's answer to the amended cross-complaint are in substance the same as the averments of the amended first paragraph of reply above set out. The averments of the second paragraph of amended answer to the first and second paragraphs of the cross-complaint are in substance the same as those of the second paragraph of amended reply above set out.

The vital and controlling question in the controversy between appellee and appellant Krieg depends upon the sufficiency of the plea of estoppel presented by the amended first paragraph of reply to the second, third, and fourth paragraphs of Krieg's answer to the complaint and the first paragraph of appellee's answer to Krieg's amended cross-complaint. Appellant contends that the reply aforesaid is insufficient as a plea of estoppel, because it shows that Price indorsed the certificate to appellee in Illinois, and

fails to show that appellee made any inquiry of Krieg as to whether Price was the lawful owner of the certificate or had authority to dispose of the same, or whether Krieg made any representations to appellee whereby it was induced to purchase the certificate. The pleadings show that the certificate was duly issued to appellant Krieg by his coappellant, Huntington County Bank; that Krieg duly indorsed and transferred it to Price by unrestricted indorsement, and that by like indorsement Price transferred it to appellee for full face value without notice or knowledge on the part of appellee of any irregularity or fraud in the procurement of the certificate by Price, or of any defense thereto.

The effect of these unrestricted indorsements and the delivery of the certificate to appellee was to invest appellee with the legal title to, and the
5 possession of, the certificate, with the consequent right to recover thereon, unless such right is defeated by some equitable principle that may be invoked by appellant Krieg to defeat such recovery. *Shirk v. North* (1894), 138 Ind. 210, 214, 37 N. E. 590; *Moore v. Moore* (1887), 112 Ind. 149, 151, 13 N. E. 673, 2 Am. St. 170; *Scott v. First Nat. Bank* (1880), 71 Ind. 445, 447; *Wolf v. American Trust, etc., Bank* (1914), 214 Fed. 761, 765, 132 C. C. A. 410.

The nonnegotiability of the instrument under the law merchant does not affect its assignability, nor
6. defeat the transfer of the legal title by indorsement and delivery thereof, though certain defenses are available against such instrument that are not available against the holder of an
7. instrument which is negotiable by the law merchant. *Moore v. Moore, supra*, 152; *Gardner*

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v. *Beacon Trust Co.* (1906), 190 Mass. 27, 76 N. E. 455, 2 L. R. A. (N. S.) 767, 771, 772, 112 Am. St. 303, 5 Ann. Cas. 581; *Y. M. C. A. Gymnasium Co. v. Rockford Nat. Bank* (1899), 179 Ill. 599, 54 N. E. 297, 46 L. R. A. 753, 787, notes, 70 Am. St. 135, 141, and notes; *Truxton v. Fait, etc., Co.* (1899), 1 Pennewill (Del.) 483, 42 Atl. 431, 73 Am. St. 81, 85; *Davis v. Bechstein* (1877), 69 N. Y. 440, 25 Am. Rep. 218. Where one of two equally innocent parties must suffer, the one who has put it within the power of another to impose on an innocent person must bear the loss, rather than the one who has been so imposed upon. *Shirk v. North, supra*, 215; *Moore v. Moore, supra*. The one to whom a chose in action has been transferred for a valuable consideration, by due and unrestricted indorsement, without notice or knowledge of prior equities or defenses, acquires the legal title thereto, independent of its negotiability by the law merchant, and by virtue of such legal title and possession so acquired is placed in the situation of advantage, and one, who by prior unrestricted indorsement has made it possible for an immediate indorser to so transfer the instrument to the ultimate holder thereof with all the indicia of absolute ownership, must bear the loss, rather than such ultimate holder who has become the owner thereof by such transfer and indorsement, and such prior indorser under such circumstances and conditions is estopped to deny to such holder of the instrument his right to recover thereon. *Shirk v. North, supra*; *Merrill v. Springer* (1890), 123 Ind. 485, 489, 24 N. E. 258, 8 L. R. A. 61; *Moore v. Moore, supra*, 153; *Kiefer v. Klinsick* (1896), 144 Ind. 46, 57, 42 N. E. 447; *Anderson v. Hubble* (1884), 93 Ind. 570, 576, 577, 47

Am. Rep. 394; *Steele v. Michigan Buggy Co.* (1912), 50 Ind. App. 635, 642, 95 N. E. 435; *Kastner v. Pibilinski* (1884), 96 Ind. 229, 232; *Stoner v. Brown* (1862), 18 Ind. 464; *Wolf v. American Trust, etc., Bank, supra*; *Gardner v. Beacon Trust Co., supra*; *Y. M. C. A. Gymnasium Co. v. Rockford Nat. Bank, supra*; *Baker v. Wood* (1894), 157 U. S. 212, 216, 15 Sup. Ct. 577, 39 L. Ed. 677, 678; *Burton's Appeal* (1880), 93 Pa. 214; *Baltimore, etc., R. Co. v. Good* (1910), 82 Ohio St. 278, 92 N. E. 435, 29 L. R. A. (N. S.) 713; *McCarthy v. Crawford* (1909), 238 Ill. 38, 86 N. E. 750, 29 L. R. A. (N. S.) 252, 254, 128 Am. St. 95.

In *Moore v. Moore, supra*, it is said: "The more modern rule upon the subject under consideration seems to be, that where the owner of things in action, although not technically negotiable, has clothed another, to whom they are delivered in the method common to all mercantile communities, with the usual apparent *indicia* of title, he will be estopped from setting up against a second assignee, to whom the securities have been transferred for value and without notice, that the title of the first assignee was not perfect and absolute."

In *Shirk v. North, supra*, 214, it is said: "The answer raises the question of the effect of the assignment of said notes, and the subsequent purchase of them by appellant, who maintains that he acquired a good title to these notes for the following reasons: The appellee assigned said notes to A. S. Yoder by the written indorsement of her name on the back thereof in blank, and without any restrictive written conditions on the notes. She also delivered the possession of them to Yoder, and thus, by her own acts,

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clothed him with the highest *indicia* of title, viz., assignment and possession, and when he brought the notes to the appellant and offered them for sale, he had the most indisputable title that can accompany personal property, viz., the legal title indorsement and possession. * * * It appears that the appellant purchased the notes in suit in the ordinary course of business, and he looked to the evidences of title in making the investment. There is no denial in the complaint, that the appellee made the assignment and delivered the notes to Yoder. The appellant paid a valuable consideration for them, relying upon the fact that they were properly assigned and were in Yoder's possession.

"It is a familiar rule of law that where one of two equally innocent parties must suffer, the one who has put it within the power of another to impose on an innocent person must be the one to bear the loss. * * *

"In this case the appellee, by her indorsement of the notes in blank, without any restrictive conditions written thereon, and the delivery thereof to Yoder, placed it in his power to impose on the appellant. The appellee could have protected herself by making a restrictive written indorsement on the notes, stating that they had been assigned as collateral security for the debt of her husband. This would have precluded the person in whose favor it was made from making such a transfer as would create a right of action against either the party making the indorsement or any of the antecedent parties. 1 Wait's Actions and Def. 597.

"By so doing, she would have put every person to whom Yoder attempted to sell the notes, on his guard,

and prevented him from being imposed upon. She did not choose to do this, and, as between her and the appellant, she must be the one to suffer from her negligence. As against the careless assignor, the law favors the diligent, good faith assignee, who is a holder of indorsed paper for a valuable consideration, although it may not be governed by the law merchant. The appellee having indorsed the notes in blank and delivered them to Yoder, the force and effect of these acts were to vest a good title in such innocent purchaser for value. The indorsement in blank was regular, and could not be changed by parol evidence so as to show a different state of facts from what the blank indorsement presented. * * *

“Appellee avers in her complaint, that she assigned the notes in suit as collateral security for the debt of her husband, but she indorsed them in blank and delivered them to him. She concealed the facts by her indorsement in blank without restrictive conditions that she had transferred them to him as collateral security for the husband’s debt. By her unlimited indorsement of these notes, and their delivery to Yoder, she misrepresented the facts, and put it in the power of Yoder to dispose of them to an innocent person. She clothed Yoder with the highest *indicia* of ownership of personal property, and sent forth no words of warning by which innocent and unsuspecting persons could be put on their guard. The appellant, in his answer, says he expressly relied upon appellee’s indorsement and the possession of the notes by Yoder. It is clear that the appellee has, by her own conduct, brought herself within the rule declared in *Cupp v. Campbell*, *supra*, and she is now estopped,

by her own acts, from claiming the notes in controversy against the appellant.”

In *Wolf v. American Trust, etc., Bank, supra*, the United States Circuit Court of Appeals considered a case involving a pledge of stock certificates, and in an opinion by Baker, C. J., said: “Many of the cases that deny relief to a defrauded owner of commercial paper under circumstances like the present, ground the decision either on equitable estoppel or on the principle that where one of two must suffer the creator of the situation shall bear the burden.

* * * But we believe that the true ground is this: An indorsement of a negotiable instrument to a named indorsee has two aspects. In one, it is a contingent contract of debt as complete and definite as if the terms thereof were written out in full above the indorser’s signature; and in the other, it is a conveyance to the indorsee of the legal title to the instrument considered as a species of property—as perfect a conveyance as in the ordinary bill of sale of the ordinary chattel. Concerning the indorser’s liability on his contingent contract of debt, the maturity of the instrument may or may not be important. As to the validity of the indorser’s conveyance of the legal title, the maturity of the instrument is inconsequential. And so in this case, inasmuch as appellee is not counting on appellant’s contingent contract of debt but is only asking him to respect his conveyance of the legal title, the principle applies, which is common to the law of all kinds of property, that the innocent purchaser of the legal title is protected against secret equities respecting the title.”

In *Baker v. Wood, supra*, the Supreme Court of the United States, by Fuller, C. J., said: “But in

respect of the assignment of choses in action, not negotiable, the assignee takes subject to the equities between the debtor and the original creditor subsisting at the time of the assignment, or when notice is received thereof. Where, however, equities between the original assignor and a subsequent assignee, or entirely in favor of third persons are involved, and the unconditional power of disposition has been intrusted by such assignor to his assignee, the principle of estoppel applies in favor of purchasers in good faith, and without notice."

In *Gardner v. Beacon Trust Co.*, *supra*, the Supreme Court of Massachusetts, after speaking of the general rule applicable to past due commercial paper, said: "But the case is very different where the owner of an overdue note transfers it under circumstances which enable his transferee to deal with it though obtained by fraud as if he were the true owner, and when an innocent purchaser for value takes it from such transferee before the transfer has been avoided. In such a case no equity attaches to the note in favor of the true owner as against the innocent purchaser for value, since it was by his own act that the perpetrator of the fraud was enabled to commit it. The true owner of an overdue note may deal with it as with any other property, and the mere fact that the note is overdue does not in such case, in the absence of anything in the transaction to suggest suspicion, put a purchaser upon inquiry any more than a purchaser is bound in any other case to inquire into the title of his vendor. See *White v. Dodge*, 187 Mass. 449. The possibility that the title may have been obtained by fraud exists in all cases. But that is not enough to put a purchaser upon inquiry. Any

other view would put upon the innocent purchaser for value of overdue negotiable paper the onus of a defective title no matter how much he may have been misled by the conduct of the true owner. We do not think that such is the law."

Under the foregoing authorities, we hold that the court did not err in overruling the demurrer to the amended first paragraph of appellee's reply

7. to the second, third and fourth paragraphs of the separate answer of appellant Krieg to the complaint, for the reason that said reply shows that the certificate of deposit was issued by the Huntington County Bank in regular form to appellant Krieg; that it was by him transferred to Price by unrestricted indorsement; that Price by like indorsement transferred the same to appellee for the full face value of the certificate, in the due course of business, without any notice or knowledge on the part of appellee of any fraud or illegality in the procurement of the instrument by Price, or of any defense whatever on the part of Krieg to the collection of the amount due thereon; that appellee relied on the possession by Price of said certificate and the unrestricted indorsements thereof, and was thereby induced to purchase the same. In other words, the reply is sufficient as a plea of estoppel against appellant Krieg. For the same reason the first paragraph of appellee's amended answer to appellant's amended cross-complaint is good as a plea of estoppel.

The assignments of error also present the sufficiency of the second paragraph of appellee's amended reply to the second, third and fourth paragraphs of appellant's answer to the complaint.

The pleading sets up in general terms the same

facts that are averred in greater detail in the first paragraph of amended reply aforesaid, and is

7. therefore sufficient, for the reason that it shows that appellee obtained the certificate in good faith in the due course of business for full

8. value, from Price, who obtained it by indorsement of Krieg, without notice or knowledge on the part of appellee of any defect therein, or of any fraud or illegality in the procurement thereof. *Tescher v. Merea* (1889), 118 Ind. 586, 589, 21 N. E. 316; *National Bank v. Isham* (1876), 48 Vt. 590, 593; *Roberts v. Hall* (1870), 37 Conn. 205, 9 Am. Rep. 308; 7 Cyc 924 *et seq.* The sufficiency of the pleading does not depend upon the laws of Illinois, as did the third paragraph of reply to the third and fourth paragraphs of appellant's answer, considered and passed upon by the court in the former opinion. If there is any doubt about the sufficiency of the second paragraph of the reply herein held good, it would result from a view that would hold the averments insufficient to show an unrestricted indorsement of the certificate by appellant Krieg. If the reply is insufficient for such reason, which we do not hold, the error in holding it good would be harmless to appellant, for the reason that the record shows without doubt or controversy that each of the indorsements was in due form and unrestricted; that the certificate was regular in form, and there was nothing upon or connected with it to indicate any irregularity in its transfer by appellant Krieg to Price or by Price to appellee. *Gregory v. Arms* (1911), 48 Ind. App. 562, 581, 96 N. E. 196. For the reasons already stated, appellee's second paragraph of amended answer to the

cross-complaint was sufficient to withstand the demurrer.

The answers of the jury to the interrogatories, in substance, show that the Huntington County Bank

issued the certificate of deposit to Krieg, who

9. transferred it to James W. Price by writing his name across the back thereof and by delivering the same to him; that Krieg transferred the certificate to Price to take up his note for \$4,350 previously executed by him to Price; that Price transferred the certificate to appellee by writing his name across the back thereof and delivering it to appellee; that Price received from appellee for said certificate the sum of \$4,250 in currency; that appellee, prior to the time it purchased said certificate, had neither notice nor knowledge of any fraud practiced by Price upon Krieg in obtaining the certificate; that the consideration received by Krieg from Price was a deed for certain territory in which to sell a patented farm derrick; that Krieg accepted said deed and received and retained \$500 from the resale of a part of such territory conveyed by Price to him; that such resale was made after Price had transferred the certificate to appellee; that appellee received no notice of any claim of a defense to the collection of said certificate until after it had purchased and paid for the same; that the principal and interest of said certificate at the date of trial amounted to \$5,809.03. Under the law already announced in this opinion it is clear that the answers are not in conflict with the general verdict, but are in harmony therewith. The court therefore did not err in overruling appellants' motion for judgment on the answers to the interrogatories.

We have examined the instructions given and those

tendered and refused, and find no reversible error in the giving or refusal of instructions. Those

10. given, when considered as a whole, are as favorable to appellants as the law will warrant. Most of the objections urged are based upon views of the law of the case which we have held untenable. The other objections urged are technical in character, and in any view could not have affected any substantial right of appellants.

Likewise, under the issues of this case and the law as herein declared, the questions suggested as to the admissibility of evidence show no ruling in favor of appellee adverse to any substantial right of the appellants.

It is also urged that there is no warrant under the issues in this case for the rendition of a personal judgment against either appellant; that only

11. the fund paid into court can be reached. The suit was originally against the Huntington County Bank to recover on the certificate, and on its petition and likewise on his own petition appellant Krieg was made a party defendant. Neither of the appellants filed a motion to modify or change the judgment in any respect, and, under the well-established rule, in the absence of such motion, no question as to the form of the judgment or extent of the relief granted is presented. *Home Brewing Co. v. Johnson* (1907), 41 Ind. App. 44, 46, 83 N. E. 358; *Broeker v. Aetna Life Ins. Co.* (1907), 41 Ind. App. 316, 83 N. E. 756; *Williams v. Manley* (1904), 33 Ind. App. 270, 273, 69 N. E. 469; *Jerrell v. Brubaker* (1897), 150 Ind. 260, 271, 49 N. E. 1050; *Evans v. State* (1898), 150 Ind. 651, 655, 50 N. E. 820.

It is also urged that the amount of the verdict is

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excessive; that in no event is appellee entitled to recover more than the amount paid into court, while the verdict is for the face value of the certificate, with six per cent. interest from the date of the demand for payment to the time of trial.

As shown in the former opinion, the bank paid into court the sum of \$4,381, the amount of the certificate and accrued interest to the date of such pay-

12. ment. Notwithstanding such payment, the bank, as well as Krieg, continued as an active adversary opposing appellee's recovery of any

13. amount, and after the return of the verdict filed a motion for judgment in its favor on the

answers of the jury to the interrogatories and a motion for a new trial. The case does not come strictly within the rule of interpleader as to the Huntington County Bank. *Nofsinger v. Reynolds* (1875), 52 Ind. 218, 225; *Northwestern, etc., Ins. Co. v. Kidder* (1903), 162 Ind. 382, 387, 70 N. E. 489, 66 L. R. A. 89, 1 Ann. Cas. 509. A party who interpleads and pays money into court does so on the theory that he acknowledges his liability and discharges it under the protection of the court to avoid complications with parties who assert conflicting claims to the money so paid by him. One of the essential elements of such interpleader is that the party does not assert any claim to the money so paid or claim any interest in the controversy, other than that of saving himself from costs and expenses of litigation. In *Northwestern, etc., Ins. Co. v. Kidder, supra*, it is said: "The person asking the relief * * * must not have nor claim any interest in the subject-matter. * * * The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded

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* * * he must stand perfectly indifferent between them, in the position merely of a stakeholder." If appellant Huntington County Bank desired to occupy the position of an interpleader, it could not consistently continue as an adversary of appellee, and by so doing has waived its right to claim benefits that come to one who occupies the position of interpleader, or stakeholder, between litigants.

As already indicated, this suit was originally to recover on the certificate, and Krieg, the payee and indorser of the certificate, asked and was granted the privilege of being made a defendant to the suit, and as such, at all stages of the proceedings, has resisted appellee's claim to the money paid into court, and denied his right to a recovery of any amount whatever on the certificate, either from himself as indorser or from the Huntington County Bank as maker of the instrument. We therefore conclude that the judgment for the face value of the certificate, and six per cent. interest from the time payment was demanded by appellee, is not excessive as to either of the appellants.

The case seems to have been fairly tried on the merits, and no intervening error has been pointed out which affects the substantial rights of either of the appellants. *Friebe v. Elder* (1913), 181 Ind. 597, 609, 105 N. E. 151.

Judgment affirmed.

NOTE.—Reported in 111 N. E. 31.

WOLFE v. GRINER.

[No. 9,850. Filed June 4, 1920.]

1. **MASTER AND SERVANT.—Safe Place to Work.—Scaffolds.**—Though the general rule at common law is that the master's duty to furnish the servant a safe place in which to work may not be delegated, an exception thereto applies in the construction of scaffolds, the rule being that, where a scaffold is required in the performance of the work, ordinarily the master owes the servant a duty in the alternative, either to furnish the scaffold or suitable materials for the construction thereof. p. 702.
2. **MASTER AND SERVANT.—Safe Place to Work.—Scaffolds.—Liability.**—If the master elects to furnish a scaffold as a completed structure, he is responsible for a lack of reasonable care in its construction to a servant injured thereby, whether the choice is made in person or by one clothed with apparent authority; but where the master does not undertake to furnish the scaffold, but merely supplies suitable material therefor, the construction being entrusted to, or assumed by, the servants within the scope of their employment, the master is not liable for negligent construction to a servant injured thereby. p. 702.
3. **MASTER AND SERVANT.—Furnishing Scaffold.—Evidence.**—The act of the master's foreman in directing a servant to construct a scaffold is not decisive of the question whether the master elected to furnish a completed scaffold or suitable materials therefor, such act being consistent with either theory. p. 703.
4. **MASTER AND SERVANT.—Furnishing Scaffold.—Conflicting Evidence.—Jury Question.**—In a servant's action for injuries caused by a defective scaffold upon which he was working, whether the master elected to furnish suitable materials for the scaffold, leaving the construction thereof to the servants, or to furnish a completed scaffold under his direction or that of his representative, is a question for the jury where the evidence is conflicting or reasonably consistent with either theory. p. 704.
5. **MASTER AND SERVANT.—Scaffolds.—Construction.—Adoption by Master.**—In a servant's action for injuries caused by a defective scaffold, where there was some evidence that the plaintiff was not present when the scaffold was built and did not know the kinds of materials used, and that, upon inquiring before going upon the scaffold, he was assured by the defendant's foreman that it was "solid and good," the jury could have properly found that the master adopted it after its construction and furnished

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it to the plaintiff as a completed appliance, notwithstanding undisputed evidence showing that the master did not originally elect to furnish a completed scaffold. p. 705.

6. **MASTER AND SERVANT.—Scaffolds.—Adoption.—Liability.**—Where a master, after a scaffold is built under circumstances relieving him from liability, adopts it and furnishes it to the servant as a completed appliance, he becomes liable for injuries sustained by a servant by reason of negligent construction thereof. p. 705.
7. **MASTER AND SERVANT.—Assumption of Risk.—Contributory Negligence.—Jury Question.**—Where a servant, while acting in obedience to specific orders and directions of the master, was injured as a result of such obedience, it cannot be said, as a matter of law, that the injury was the result of an assumed risk, especially if the master gave the servant assurances of safety, though prior to receiving such assurances the servant had doubts and misgivings as to the danger; nor, under such circumstances, can it be said, as a matter of law, that the servant was guilty of contributory negligence. pp. 706, 707.
8. **TRIAL.—Directing Verdict.**—In a servant's action for injuries caused by a defective scaffold upon which he was working, it was error to direct a verdict for the defendant where there was some evidence from which inferences might have been drawn in the plaintiff's favor on each essential averment of the complaint and also on the issues of assumption of risk and contributory negligence relied on by the defendant. p. 707.

From Elkhart Superior Court; *James M. Harmon*, Judge.

Action by Henry K. Wolfe against Valentine Griner. From a judgment for the defendant, the plaintiff appeals. *Reversed.*

James S. Dodge, for appellant.

Deahl & Deahl, for appellee.

BATMAN, J.—This is an action brought by appellant to recover damages for personal injuries, caused by the alleged negligence of appellee. The complaint is in a single paragraph and alleges, among other things, that appellee was the owner of certain real

estate on which he was erecting a dwelling house; that in so doing it became necessary to erect a scaffold against the side of said building, about twenty feet high, as an appliance for the use of the workmen in nailing shingles upon the roof; that a scaffold was erected by appellee and the workmen employed by him for such purpose; that among said workmen was one Frank Griner, who was left in charge of said work and workmen by appellee, as his agent or foreman, for the purpose of superintending the construction of said building; that said Frank Griner, during the time he was so employed, assisted and directed the construction of the scaffold; that it was constructed of steel brackets fastened to the walls of said building, with planks laid upon the same to support the workmen while nailing shingles upon the roof; that in the proper construction of the scaffold, the steel brackets should have been fastened to the walls of said building by large screws or bolts, or with large nails driven through the openings in the same into the walls of said building; that said nails should have been sufficiently large and strong to maintain the brackets in place, and that such manner of construction was well known to all careful workmen; that had said scaffold been so erected, it would have been a safe appliance to use in the construction of said building, and appellee's employes could have worked upon the same in safety; that said scaffold was not erected in a safe and workmanlike manner, in this, that the steel brackets thereof were fastened to the walls of said building by nails too small to hold the scaffold in place when it was used by the workmen for the purpose intended; that appellant did not assist in the erection of said scaffold, and, prior to the

time of his alleged injuries, had no knowledge of the manner in which the same had been constructed; that on September 24, 1914, appellee's foreman, the said Frank Griner, directed appellant to go upon said scaffold for the purpose of nailing shingles upon the roof of said building; that at such time he was informed by said foreman that said scaffold was properly erected and perfectly safe; that appellant examined the same as well as he could from the ground, and it appeared to be properly constructed; that in pursuance of such instructions appellant went upon said scaffold and began to perform the work assigned to him; that almost immediately thereafter the steel brackets of said scaffold came loose from said building, by reason of the insecure manner in which the same were fastened thereto, and the scaffold, together with appellant, fell to the ground a distance of about twenty feet; that the falling of the scaffold was caused by the lack of care and skill on the part of appellee's said agent and foreman in the construction thereof; that as a result of the fall appellant, without fault on his part, received serious bodily injuries, and that such injuries were caused solely by the negligence of appellee in erecting and causing said scaffold to be erected. To this complaint appellee filed a demurrer, which was overruled, and the issues were then closed by an answer in general denial. The cause was submitted to a jury for trial, and at the close of appellant's evidence the court gave the jury a peremptory instruction to return a verdict for appellee, which was accordingly done. Appellant filed a motion for a new trial, which was overruled, and judgment was rendered for appellee. From this judgment appellant appealed, and has assigned cer-

tain alleged errors on which he relies for reversal. We will only consider the one relating to the action of the court in overruling appellant's motion for a new trial, as such assignment is the only one which properly presents any question for our determination.

Appellant's motion for a new trial is based on a number of reasons, all of which have been waived by a failure to present the same in his brief, except those which in their final analysis relate to the action of the court in directing the jury to return a verdict for appellee.

This is a common-law action in which a servant seeks to recover damages of his master for negligence in failing to use reasonable care to fur-

1. nish him a safe place in which to work. As a general rule, such a duty rests upon a master, and he cannot relieve himself of such responsi-

2. bility by delegating the same to another.

Louisville, etc., R. Co. v. Hanning, Admr. (1891), 131 Ind. 528, 31 N. E. 187, 31 Am. St. 443; *Sullivan v. Indianapolis, etc., Traction Co.* (1913), 55 Ind. App. 407, 103 N. E. 860. But this rule has its exceptions, which must be given effect in proper cases. *Lehigh, etc., Cement Co. v. Bass* (1913), 180 Ind. 538, 103 N. E. 483; *Lavene v. Friedrichs* (1917), 186 Ind. 333, 115 N. E. 324, 116 N. E. 421. One of such exceptions frequently arises with reference to scaffolds used by servants in the performance of their duties. It is well settled that where an employer undertakes to furnish an employe a scaffold on which to work, as a completed structure, it is his duty to see that it is reasonably safe and suitable for the purpose for which it is intended. *Lagler v. Roch* (1914), 57 Ind. App. 79, 104 N. E. 111; *Studebaker v. Shelby Steel Tube*

Co. (1910), 226 Pa. St. 239, 18 Ann. Cas. 611, and note; *Haakensen v. Burgess, etc., Co.* (1912), 76 N. H. 443, 83 Atl. 804, Ann. Cas. 1913B 1122, and note. But where an employer is not required to furnish such scaffold and does not undertake to furnish the same, but merely supplies suitable material therefor and the construction thereof is entrusted to, or assumed by, the workmen themselves within the scope of their employment, the employer is not answerable to one of his servants injured thereby for the negligence of a fellow servant in the construction thereof. *Patterson v. Southern R. Co.* (1912), 52 Ind. App. 618, 99 N. E. 491; *Cincinnati Gas, etc., Co. v. Underwood* (1915), 60 Ind. App. 351, 107 N. E. 28; *Lagler v. Roch, supra*; *Studebaker v. Shelby Steel Tube Co., supra*; *Haakensen v. Burgess, etc., Co., supra*; *Griffin & Son v. Parker* (1914), 129 Tenn. 446, 164 S. W. 1142, L. R. A. 1917F 497. It thus appears that, where a scaffold is required by servants for the performance of their duties, ordinarily the master owes them a duty in the alternative, either to furnish such scaffold or suitable materials therefor. 4 Labatt, Master and Servant (2d ed.) §1546. The act of choosing between such alternatives belongs to the master. If he elects to furnish such scaffold, he is responsible for a lack of reasonable care in its construction, whether the choice is made by himself in person, or by one clothed by him with apparent authority so to do. *Penson v. Inland, etc., Paper Co.* (1913), 73 Wash. 338, 132 Pac. 39, L. R. A. 1915F 15.

In this case there is evidence which tends to show that appellee was the owner of the building under construction; that he employed one Frank
3 Griner, as his foreman, and placed him in charge of the men and the work; that in the

process of construction Ernest Griner, who

4. was a workman on the building, constructed a scaffold on the east side thereof, by the direction of said foreman; that in so doing he used eight-penny nails to fasten the brackets of the scaffold to the walls of the building; that the nails were too small for such purpose, and rendered the construction of the scaffold defective; that appellee had furnished on the premises other nails of sufficient size, which the workmen could have used for such purpose; that appellant went upon the scaffold by the direction of such foreman for the purpose of assisting in the construction of the building; that, while he was on the scaffold in performance of the work so assigned him, it fell by reason of such defective construction, and caused the injuries of which he complains. We are unable to determine from these facts, or from any other facts which the evidence tends to establish, what choice appellee made with respect to the two alternatives open to him in regard to the construction of the scaffold, or in fact what course he pursued with reference thereto. The act of appellee's foreman in directing one of the workmen to construct the scaffold is not decisive, as it is consistent with either theory. *Patterson v. Southern R. Co., supra*. It is apparent, under the well-settled rule respecting directed verdicts, that, in a case where the evidence is conflicting, or reasonably consistent either with the hypothesis that the defective scaffold was constructed by the fellow servants of the injured person out of materials furnished by the master, or with the hypothesis that it was constructed under the direction of the master or his representative, the question is one for the jury. 4 Labatt, Master and Servant

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(2d ed.) §1546; *Penson v. Inland, etc., Paper Co.*, *supra*; *Lyons v. City of New Albany* (1913), 54 Ind. App. 416, 103 N. E. 20; *Matthews v. Myers* (1916), 64 Ind. App. 372, 115 N. E. 959. The evidence before us presents a case where the jury might have drawn reasonable inferences in support of either theory respecting the construction of the scaffold, and hence the question for determination in that regard was one of fact rather than one of law.

But if it could be said that the undisputed evidence shows that appellee did not originally elect to furnish the scaffold in question as an appliance

5. for the use of his workmen, but furnished suitable material therefor and left its construction to them, still under the evidence of this

6. case a directed verdict in favor of appellee would not have been authorized. This arises

from the fact that there is some evidence that appellant was not present when the scaffold was constructed, and did not know the kind of nails used therein; that prior to the time he went upon the scaffold to work he inquired of appellee's foreman as to the safety of the scaffold, and was assured by him that it had been constructed "solid and good." Under these circumstances the jury might have found that appellee adopted this scaffold after its construction and furnished it to appellant as a completed appliance for his use in the performance of the work required of him. In that event, appellee in his relation to appellant would have been liable for any negligence in its construction, notwithstanding the fact that it had been originally built under such circumstances as to relieve him from liability for any negligence in the manner of its construction.

Appellee contends that the evidence shows that appellant's alleged injuries were the result of a risk assumed by him as an incident to his employ-

7. ment, and hence the court did not err in directing a verdict. It is well settled that a servant in accepting employment assumes all the hazards and dangers necessarily incident to the service that are open and apparent, whether necessarily incident to the services or not. Such assumption includes not only those hazards and dangers that are known, but also such as may be discovered by the exercise of reasonable care and diligence. *Indianapolis Traction, etc., Co. v. Holtsclaw* (1907), 41 Ind. App. 520, 82 N. E. 986; *Lagler v. Roch*, *supra*. This rule, however, has been relaxed in cases where the servant, at the time of receiving the injury, was acting under specific directions and orders of the master and where his injury was the result of such obedience. In such cases, especially where the master gives assurance of safety, he may obey the order, even though before such assurance was given he may have had doubts and misgivings as to the danger, and by so doing he does not necessarily assume the risk. *Standard Cement Co. v. Minor* (1913), 54 Ind. App. 301, 100 N. E. 767, and authorities there cited. While it is true, as appellee claims, the evidence shows that appellant knew that other scaffolds on the building in question had been constructed with eightpenny nails; that he realized that a scaffold so constructed was unsafe, and made objections to a fellow workman with reference thereto, it is likewise true that there is evidence which tends to show that appellant was not present when the particular scaffold in question was constructed and did not know the kind of nails used

therein, but believed that they would not use eight penny nails on a scaffold that high. There is also evidence that prior to the time appellant was directed to go upon the scaffold to continue his work on the building, appellee's foreman assured him that the scaffold had been constructed "solid and good." In the light of this evidence we cannot say as a matter of law, under the rule stated, that appellant's injuries were the result of an assumed risk.

Appellee finally seeks to justify the giving of the peremptory instruction on the ground that the evidence shows that appellant was guilty of contributory negligence. We cannot agree in this view of the case. Under the evidence stated above, the question of contributory negligence was clearly one for the jury.

A careful consideration of the entire record leads us to conclude that upon each essential averment of the complaint, and upon the questions of assumption of risk and contributory negligence, there was at least some evidence from which the jury might have drawn inferences in appellant's favor. Under the authorities this was sufficient to require a submission of the case to the jury. *Patterson v. Southern R. Co.*, *supra*; *Lyons v. City of New Albany*, *supra*; *Parker v. Hickman* (1915), 61 Ind. App. 152, 111 N. E. 649; *West v. National Casualty Co.* (1915), 61 Ind. App. 479, 112 N. E. 115. The trial court, therefore, erred in giving the peremptory instruction.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

MILES v. BOUSE ET AL.

[No. 10,044. Filed March 12, 1918.]

From Wells Circuit Court; *W. H. Eichhorn*, Judge.

Action by Arla (Dawley) Miles against Bertha Bouse and others. From a judgment for the defendants, the plaintiff appeals. *Affirmed*.

Abram Simmons and *Charles G. Dalley*, for appellant
Frank W. Gordon and *L. B. Simmons*, for appellees.

BATMAN, P. J.—This is an action by appellant against appellees to quiet title to certain real estate. The issues, evidence, and questions presented are identical with those in *Smithson v. Bouse* (1918), *ante* 66, 118 N. E. 970, the real estate in question being 120 acres of the 200-acre tract mentioned in the opinion in said cause. By an agreement of the parties these causes were consolidated on appeal for the purpose of briefing and consideration by this court. On the authority of said cause No. 10045, and with the same limitations as to the scope of the decision, the judgment in this case is affirmed.

KRETZER ET AL. v. GROSS.

[No. 9,517. Filed March 14, 1918.]

From Marion Probate Court; *Mahlon E. Bash*, Judge.

James M. Leathers, for appellants.
Means & Buening, for appellee.

BATMAN, P. J.—The record discloses that this is an action to contest a will. This court, therefore, is without jurisdiction. §1392 Burns 1914, Acts 1907 p. 237. For that reason, this cause is transferred to the Supreme Court under the provision of §1397 Burns 1914, Acts 1901 p. 565, §13.

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[NOTE—The citation *Reed, Exr., v. Farmers Bank, etc.*, 425, 428 (2) indicates that the opinion begins on page 425, that the point cited is on page 428, and that the point is numbered (2) in the margin.—REPORTER.]

ABATEMENT AND REVIVAL—

Executors.—Substitution in Suit.—Voluntary Appearance.—Statutes.—Section 2829 Burns 1914, §2311 R. S. 1881, providing that no action shall be brought by complaint and summons against any executor on contract, etc., has no application to a case where suit was not brought against an executrix, but against her deceased husband prior to his death, and upon her substitution as the representative of his estate, she appeared to the action, so that, under the provisions of §318 Burns 1914, §315 R. S. 1881, relating to service of summons, there was no need for summons.
Reed, Exr., v. Farmers Bank, etc., 425, 428 (2).

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See also FRAUDS.

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ALTERATION OF INSTRUMENTS—

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2. *Material Alteration.—Time of Payments.—Release of Surety.*—An alteration of a note after its execution which postpones the date of payment is material, and such note is unenforceable against a maker, or a surety, not consenting to the alteration. *Wright, Rec., v. O'Brien*, 521, 524 (2).
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I. DECISIONS REVIEWABLE.

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2. *"Final Judgment."*—A judgment against the cross-complainants rendered on a motion to strike out their cross-complaint, though it disposes of all the issues as to all the defendants thereto, is

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not a final judgment, within the meaning of §671 Burns 1914, §632 R. S. 1881; the ruling on such motion and the judgment thereon are but steps in making up the issues, and any error committed in so doing may be presented and determined on an appeal after final judgment affecting all the issues and all the parties.
Faylor v. Koontz, 355, 358, 359 (2).

3. *Moot Question.*—Where the plaintiff remitted the amount recovered in an injunction suit, leaving only the judgment for costs, and the record shows that the injunction had been terminated by mutual consent of the parties before the appeal was perfected, the court on appeal will not review the questions presented to determine the matter of costs.

Showers v. Goodman, 352, 354 (2).

4. *"Final Judgment."*—A final judgment, within the meaning of §671 Burns 1914, §632 R. S. 1881, is one that at once disposes of all the issues, as to all the parties, involved in the controversy presented by the pleadings, to the full extent of the power of the court to dispose of them, and puts an end to the particular case as to all the parties and all the issues.

Faylor v. Koontz, 355, 357 (1).

5. *Judgment for Costs.*—*"Final Judgment."*—A judgment, entered on a motion to strike out a cross-complaint, which did not dispose of all the issues as to all the parties, was not rendered appealable, under §671 Burns 1914, §632 R. S. 1881, by the inclusion of an award of costs as a part thereof, since the award of costs, being but an incident to the action, adds nothing to the merit of the appeal.

Faylor v. Koontz, 355, 359 (3).

6. *Right of Appeal.*—*Final Judgment.*—A petition to set aside a judgment which was in effect merely a motion to vacate the ruling on the motion for a new trial cannot be regarded as an independent proceeding, and the striking of such petition from the files, and the judgment for costs do not constitute a final judgment from which an appeal may be taken under §671 Burns 1914, §632 R. S. 1881, giving the right of appeal from final judgments.

Stampfer v. Peter Hand Brewing Co., 485, 492 (2).

II. RIGHT OF REVIEW.

7. *Estopped to Allege Error.*—*Accepting Benefits.*—The acceptance of rent by a landlord for the occupancy of real estate for periods both before and after the rendition of a judgment permanently enjoining interference with the tenancy amounted to an acknowledgment of the tenancy and of the legality of the judgment, and estops such landlord from asserting on appeal that the judgment is erroneous.

Showers v. Goodman, 352, 355 (3).

8. *Pleading.*—*Demurrer.*—*Waiver of Defects.*—The objection that an answer, in an action on a note, is defective because the word "signed," as used in the answer, is not equivalent to the word "executed" is waived where such defect was not specified in the memorandum to the demurrer, as required under §344, cl. 6, Burns 1914, Acts 1911 p. 415.

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10. *Review.—Necessity of Exceptions.*—Generally, the failure to save an exception to the ruling of the trial court which is assigned as error on appeal is fatal to such assignment.
Price v. State, ex rel., 1, 5 (1).
11. *Review.—Judgment.—Correction.—Motion to Modify.*—A motion to modify is the proper procedure to correct an erroneous judgment, and such motion must be made to present any question on appeal as to the correctness of the judgment.
Smith, Adm., v. Cleveland, etc., R. Co., 397, 421 (34).
12. *Review.—Motion to Modify Judgment.*—Generally, a party seeking relief from the form or substance of some part of a judgment rendered against him must first present to the trial court a motion definitely specifying in what respect the judgment should be modified, and, if such motion is overruled, the ruling should be assigned as error to present the question for review on appeal.
Price v. State, ex rel., 1, 5 (2).
13. *Review.—Modification of Judgment.*—Where neither defendant presented a motion to modify or change the judgment rendered in the plaintiff's favor by the trial court, no question as to the form of the judgment, nor as to the extent of the relief granted, is presented.
Krieg v. Palmer Nat. Bank, 677, 695 (11).

IV. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

See also 39, 45.

14. *Bond.—Time for Filing.—Statute.*—Under §2978 Burns 1914, Acts 1913 p. 65, relating to appeals and providing that an appeal bond must be filed within thirty days after the decision complained of, the time begins to run from the rendering of final judgment.
Leslie v. Ebner, Admr., 32, 36 (2).
15. *Filing Transcript.—Time.*—Under §2978 Burns 1914, Acts 1913 p. 65, relating to appeals from decision growing out of matters connected with decedents' estates and providing that the appeal bond shall be filed within thirty days after judgment and the transcript within ninety days after filing the appeal bond, where one whose interests are adverse to the estate prosecutes an appeal, he is entitled to 120 days from the rendering of final judgment within which to file his transcript in the appellate tribunal, although the appeal bond may have been filed within less than the thirty days; and an administrator, even though not required to furnish an appeal bond, has the same period of time in which to file the transcript on appeal.
Leslie v. Ebner, Admr., 32, 37 (4).
16. *Perfecting.—Certification of Record.*—Where, subsequently to the filing of appellee's motion to dismiss the appeal for improper certification of the record, appellant was granted permission to have the clerk amend the original certificate to the transcript, and a new certificate of the clerk of the trial court in due form was appended thereto bearing a date two days later than the granting of the permission, the new certificate substantially complied with the permission, and cured any defects in the original certification.
Smith, Adm., v. Cleveland, etc., R. Co., 397, 406 (3).
17. *Time for Taking.—Effect of Collateral Proceedings.*—A motion to set aside a ruling denying a motion for new trial was a col-

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lateral proceeding and did not extend the time in which to appeal from the original judgment.

Stampfer v. Peter Hand Brewing Co., 485, 493 (3).

18. *Term-Time Appeal*.—Where plaintiff prayed an appeal, but the amount of bond was not fixed, no sureties named, and no time given in which to file an appeal bond, it cannot be said that plaintiff attempted to take a term-time appeal, as such steps were necessary preliminaries to perfecting such an appeal.

Smith, Adm., v. Cleveland, etc., R. Co., 397, 405 (1^f).

19. *Vacation*.—*Term-Time*.—*Failure to Perfect*.—*Effect*.—An appeal prayed and granted in term, if not perfected as such, will be treated and sustained as a vacation appeal, where the statutory requirements for such an appeal have been followed.

Smith, Adm., v. Cleveland, etc., R. Co., 397, 405 (2).

V. RECORD—PREPARATION AND CONTENTS.

See also 16, 30, 39, 42; **EXCEPTIONS, BILL OF.**

20. *Bill of Exceptions*.—*Judge's Signature*.—*Filing*.—To incorporate a bill of exceptions in the record, it must be filed in the clerk's office after it has been signed by the trial judge.

Smith, Adm., v. Cleveland, etc., R. Co., 397, 406 (4).

21. *Bill of Exceptions Containing the Evidence*.—*Recital as to Evidence*.—Where the judge's certificate to a bill of exceptions containing the evidence recited that the transcript of the evidence embodied in the bill was certified to be a full, true and complete report of the evidence given on the trial, the bill sufficiently showed that it contained all the evidence given at the trial, since such fact may be shown either by a statement in the bill itself, or in the judge's certificate thereto.

Smith, Adm., v. Cleveland, etc., R. Co., 397, 407 (5).

22. *Questions Presented for Review*.—An assignment of error questioning the sustaining of a demurrer presents no question for review where the demurrer is not in the record.

Krieg v. Palmer Nat. Bank, 677, 681 (2).

VI. ASSIGNMENTS OF ERROR.

See also 22; **MASTER AND SERVANT** 37.

23. *Presenting Questions for Review*.—*Ruling on Motion to Dismiss*.—No question is presented for review as to the trial court's overruling defendant's motion to dismiss the complaint as to her where such ruling is not challenged by any assignment of error.

Reed, Exrx., v. Farmers Bank, etc., 425, 428 (1).

24. *Reversible Error*.—*Highways*.—*Obstruction*.—*Collateral Attack*. Assuming that a complaint to enjoin the obstruction of a highway shows on its face that it is a collateral attack on a judgment of the board of commissioners, such fact is not controlling in determining whether reversible error is presented by assignments that the trial court had no jurisdiction of the subject-matter or of the person of the defendant, and that the complaint did not state facts sufficient to constitute a cause of action.

Eads v. Kumley, 361, 363 (1).

25. *Sufficiency*.—*Questions Presented*.—An assignment of error questioning jointly the sustaining of a demurrer to all the special replies to special answers to a cross-complaint presents no

APPEAL—Continued.

- question for review where the record shows no such ruling, but, instead shows the sustaining of separate demurrers to certain paragraphs of reply. *Krieg v. Palmer Nat. Bank*, 677, 681 (1).
28. *Review.—Void Judgment.*—Where a judgment is void, appellant may obtain relief from it on appeal by a direct assignment of error in the appellate court, even though he made no motion to modify in the trial court, and reserved no exception to the rendition of such judgment. *Price v. State, ex rel.*, 1, 9 (6).
27. *Record.—Separate Assignments.*—Where the assignment of errors, after giving the court and title of the cause, recited that "the appellant says there is manifest error prejudicial to appellant in the judgment and proceedings in this cause in this," following which were five separate and distinct assignments of error, separately stated and numbered, no one of which called in question more than one ruling of the trial court, the assignments were several and not joint.
Smith, Admr., v. Cleveland, etc., R. Co., 397, 407 (6).

VII. BRIEFS.

See also 90, 91.

28. *Abstract Proposition of Law.—Waiver of Error.*—Error assigned on the overruling of the motion for a new trial is waived, where appellant's brief directs no point or proposition to any specific ground of the motion, but contains only mere general statements which may or may not apply thereto.
Vandalla Coal Co. v. Shepard, 78, 79 (2).
29. *Contracts.—Evidence.—Admissibility.*—In a building contractor's action, there was no error in excluding evidence of contracts between the owner and other contractors for the construction of other parts of the building, where there was no showing that the appellant contractor's rights could have been affected by such contracts.
Wacker v. Essex, 584, 594 (6).
30. *Defects.—Necessity of Objections.—Statute.*—Under §3 of the act of 1917, Acts 1917 p. 523, requiring appellee, within fifteen days after the time for filing appellant's brief has expired, to file objections to the record and briefs, pointing out wherein the rules of court have not been complied with, and providing that failure to do so is a waiver of defects, where appellee did not file objections, the court is authorized to examine the record, including the evidence, to determine the merits of the appeal, though appellant has not complied with the rules of court in that his statement of the evidence consists largely of conclusions with nothing to indicate the source of such evidence, and his points and authorities consist largely of abstract propositions of law.
Leslie v. Ebner, Admr., 32, 40 (5).
31. *Questions Presented.*—Where the principal questions sought to be presented may be ascertained by the consideration of the appellant's and the appellee's briefs together, such questions so ascertainable will be considered, though the appellant's briefs are subject to criticism.
Johnson, Ins. Comr., v. Schrepferman, 606, 607 (1).
32. *Questions Reviewable.—Ruling on Motion for New Trial.—Sufficiency.*—Where, in its points and authorities, under the heading of "Error in Overruling the Motion for New Trial," appellant states a number of general propositions without attempting to

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specifically apply any of them to any of the grounds of its motion for new trial, appellant fails to strictly comply with the rules of court, but, as each of the grounds of the motion in effect attempts to present the same question, such question will nevertheless be considered.

Wm. P. Jungclauss Co. v. Ratti, 84, 87 (1).

33. *Sufficiency.—Abstract Propositions of Law.*—Where appellant's motion for a new trial contained a number of separate grounds, and in her points and authorities under the heading, "On the Admission of Evidence," were stated numerous general propositions without applying them to any particular ground of the motion, the briefs did not comply with the rules of court.

Reed, Barr., v. Farmers Bank, etc., 425, 430 (5).

34. *Sufficiency.*—Where the only reference made in appellant's propositions or points to alleged error in refusing a requested instruction is, "The court erred in refusing to give instruction No. 9 requested by defendant, and set out ante p. 19," no question is presented for review, since such statement is not a compliance with Rule 22, cl. 5, of the rules of the Appellate Court governing the preparation of briefs.

Evansville, etc., R. Co. v. Hoffman, 571, 581 (12).

35. *Sufficiency.*—Failure to comply with Rule 22, cl. 5, of the Appellate Court, requiring under a separate heading of each error relied on separately numbered propositions or points, etc., cannot be cured by a discussion of the alleged error in the argument.

Evansville, etc., R. Co. v. Hoffman, 571, 581 (13).

36. *Sufficiency.*—It is the appellant's duty to present by his briefs facts from the record relied upon to show error, as the court on appeal will not search the record to reverse, though it may, and generally will, do so in order to affirm the judgment of the lower court.

Shay v. Goina, 674, 676 (3).

37. *Sufficiency.—Good-faith Effort.*—Where appellant's briefs manifest a good-faith effort to comply with the rules of court concerning the preparation of briefs, and where there is actually a substantial compliance therewith, and to the extent that the briefs contain enough of the record to fairly present any of the questions attempted to be presented, such question or questions will be considered and determined.

Krabill v. Keesler, 263, 265 (3).

38. *Sufficiency.—Waiver of Error.*—Error assigned on the overruling of motion for physical examination of plaintiff is waived, where appellant's brief directs no point or proposition thereto.

Vandalia Coal Co. v. Shepard, 78, 79 (1).

VIII. DISMISSAL.

39. *Bill of Exceptions.—Failure to File in Time.*—Where the ruling on a motion for new trial, based solely on the ground that the verdict is not sustained by sufficient evidence and is contrary to law, is the only error assigned, and the record shows that the bill of exceptions containing the evidence was not filed within the time fixed by the court, the appeal must be dismissed.

Beard v. Fenton, 605.

40. *Briefs.—Sufficiency.—Rules of Court.*—Under the rules of the Appellate Court, an appeal will not be dismissed for failure of appellant to comply with the rules of court in the preparation of his brief, where any question is properly presented thereby, as

APPEAL—Continued.

such presentation requires the consideration and determination of the question presented. *Krabill v. Keesler*, 263, 264 (2).

41. *Failure to Comply with Statute.—Effect.*—A motion by appellee to dismiss an appeal because of appellant's failure in the preparation of his briefs to comply with the rules of court will be overruled if appellee has not complied with the act of 1917, Acts 1917 p. 523, concerning civil procedure.

Krabill v. Keesler, 263, 264 (1).

42. *Grounds.*—Where the errors assigned on appeal require a consideration of the evidence, and the record shows that the bill of exceptions containing the evidence was not filed within the time allowed for that purpose, and no extension was granted, the evidence is not in the record, and the appeal must be dismissed, since no question is presented for review.

Washbusky v. Peyton, 528.

43. *Jurisdiction.*—An appeal in a divorce proceeding in which the only error assigned challenges the jurisdiction of the trial court because of the absence of the affidavit of residence, as required by §1066 Burns 1914, §1031 R. S. 1881, will be dismissed where the record, as corrected by writ of *certiorari* on the appellee's petition, shows that the affidavit was properly filed with the complaint.

Lease v. Lease, 595.

44. *Landlord and Tenant.*—Where a judgment permanently enjoined the defendants from interfering with the plaintiff's possession of real estate so long as the latter complied with his lease, and decreed that the injunction should terminate in the event of the mutual agreement of the parties, an appeal therefrom will be dismissed where, prior to the perfection of the appeal, the tenancy was terminated by mutual consent, possession of the premises having been surrendered by the plaintiff and accepted by the defendants. *Showers v. Goodman*, 352, 354 (1).

45. *Time for Taking Appeal.*—Where a judgment was rendered on December 9, 1916, and no motion for a new trial was filed until June 8, 1917, the appeal was not taken within the time fixed by statute and it must be dismissed.

Leppert v. Vandalla R. Co., 380.

46. *Settlement.*—On appellee's verified motion to dismiss on the ground that the parties have amicably adjusted all matters involved, the appeal will be dismissed, where appellants, with due notice of the filing of the motion, fail to make a counter showing,

A. E. Garland & Co. v. Allen, 396.

IX. REVIEW.

See also 56.

(A) SCOPE AND EXTENT.

47. *Complaint.—Sufficiency.—Theory of Case Below.*—On an appeal from a judgment for damages to land caused by the obstruction of flood waters of a river, where throughout the trial a paragraph of complaint was construed by the trial court as proceeding upon the theory that the injury resulted from the obstruction of a natural watercourse, a theory in accord with its general tenor, the sufficiency of the paragraph to resist demurrer must be tested on such theory.

Evansville, etc., R. Co. v. Scott, 121, 130 (2).

48. *Demurrer.*—The court on appeal, in reviewing a ruling sustain-

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ing a demurrer to an answer is not limited to the objections stated in the memorandum accompanying the demurrer, but may consider, for the purpose of sustaining the trial court's ruling, any defects fatal to the sufficiency of the answer.

Vandalla R. Co. v. Stevens, 238, 247 (2).

49. Findings.—Consideration of Matters Outside the Record.—

Where the trial court's finding for defendants on their counterclaim was general, the court on appeal cannot consider, in determining the sufficiency of the evidence, the trial court's alleged announcement, which is not shown by the record, as to the items allowed defendants.

Wm. P. Jungclaus Co. v. Ratti, 84, 87 (2).

50. Instructions.—Technical objections pointing out alleged defects to instructions that could not have affected any substantial rights of the appellants are of no avail.

Krieg v. Palmer Nat. Bank, 677, 695 (10).

51. Instructions.—Invited Error.—Where, in an action for wrongful death, an instruction tendered by defendants was given which referred generally to the negligence of defendants by the phrase "as alleged in the complaint," defendants cannot complain of another instruction similar in form given at plaintiff's request, since error, if any, based on the general reference to the complaint, was invited.

Indianapolis Traction, etc., Co., v. Lee, Eers., 105, 114 (4).

52. Record.—Sufficiency.—Where the evidence is not in the record, an assignment of error that the court erred in overruling a motion for new trial, on the ground that the decree was not sustained by sufficient evidence, presents no question for review.

Wise v. Wise, 647, 650 (1).

53. Ruling on Motion to Vacate Judgment.—A motion to vacate a default judgment, filed at the same term at which such judgment was rendered, is a part of the proceedings of the cause, and the ruling thereon, having properly been assigned as error, calls for consideration on appeal.

Daub v. Van Lundy, 468, 473 (1).

54. Theory of Case.—Where the trial court construed a complaint as a cause in equity, seeking injunctive relief, so that plaintiff was not entitled to a jury trial, the court on appeal will adopt such construction, notwithstanding that the complaint is open to another interpretation equally as reasonable.

Fisher v. Carey, 438, 445 (6).

(B) PRESUMPTIONS.

See also BASTARDS 1; DIVORCE 4.

55. Every reasonable presumption is indulged in favor of the rulings of the trial court.

Shay v. Goins, 674, 676 (4).

56. Complaint.—Sufficiency.—Absence of Evidence from Record.—The evidence not being in the record, it should be assumed on appeal that certain informalities and uncertainties in the land description contained in a complaint to recover possession were removed by the evidence.

Little v. Hoffman, 371, 374 (4).

57. Exclusion of Evidence.—Error in excluding material evidence is presumed to be harmful.

Keller v. Cox, 381, 392 (12).

58. General Verdict.—Answers to Interrogatories.—In determining the correctness of the trial court's action in overruling a motion

APPEAL—Continued.

for judgment on the jury's answers to interrogatories, notwithstanding the general verdict for plaintiff, the court on appeal will not look to the evidence actually given in the cause, but will search the pleadings to see if, from any evidence possible under the issues, the answers can be reconciled with the general verdict, and every reasonable presumption and inference deducible from the evidence which might have been admitted in support of the general verdict will be indulged in its favor.

Evanville, etc., R. Co. v. Scott, 121, 141 (9).

(C) QUESTION OF FACT, VERDICTS AND FINDINGS.

59. *Answers to Interrogatories.—Verdict.*—In a servant's action for personal injuries resulting from the breaking of an unguarded emery wheel, a general verdict for plaintiff is not in irreconcilable conflict with answers to interrogatories to the effect that it was necessary to leave one-quarter of the wheel exposed when equipped with a guard, since such exposed portion might have been the lower quarter of the wheel, the breaking of which would not have injured the plaintiff.

Illinois Car, etc., Co. v. Brown, 315, 326 (7).

60. *Answers to Interrogatories.—Verdict.—Presumptions.*—In determining whether there is an irreconcilable conflict between the answers to interrogatories and the general verdict, the court on appeal must indulge in all inferences and reasonable presumptions in favor of the general verdict, and may consider any fact favorable under the issues.

Illinois Car, etc., Co. v. Brown, 315, 326 (6).

61. *Answers to Interrogatories.—Presumptions.*—In determining whether there is irreconcilable conflict between the general verdict and the answers to interrogatories, the court on appeal must indulge all legitimate inferences and presumptions in favor of the general verdict, and may consider in support of the general verdict any fact provable under the issues and not included in the interrogatories and answers.

Pennsylvania Co. v. Stalker, Admr., 329, 338 (4).

62. *Evidence.—Sufficiency.*—In an action against a street railroad company and the driver and owner of an automobile truck for the wrongful death of a pedestrian, evidence showing that defendant company, in violation of a city ordinance requiring it to keep a portion of the street in repair, permitted the pavement to become so worn that there were a number of holes in the same, that the driver of the truck negligently drove it in such manner that one of the wheels dropped into a hole, causing the machine to suddenly leave its course and strike deceased, is sufficient to sustain a verdict for plaintiff against all of the defendants.

Indianapolis Traction, etc., Co. v. Lee, Exr., 105, 115 (7).

63. *Evidence.—Sufficiency.—Conflicting Evidence.*—Although the evidence is conflicting, the court on appeal will not disturb the jury's verdict where there is some evidence to sustain it.

Müller v. Rayburn, 564, 566 (1).

64. *Evidence.—Sufficiency.*—A decision of the trial court on a motion to set aside a default judgment will not be disturbed on appeal, where there is evidence to sustain it.

Daub v. Van Lundy, 468, 474 (4).

65. *Evidence.—Weight and Sufficiency.*—Where there is some evidence to support every material fact necessary to plaintiff's

APPEAL—Continued.

- right of recovery, the finding of the trial court based thereon is conclusive on appeal, though such evidence may be contradicted and not entirely satisfactory. *Fisher v. Carey*, 438, 447 (11).
66. *Evidence.—Weight.—Jury Question.*—The court on appeal will not weigh conflicting evidence, the question being for the jury to determine. *Patton v. Cooper, Admr.*, 664, 667 (2).
67. *Findings of Fact.—Conclusiveness.*—Findings of fact supported by substantial evidence are conclusive on appeal. *Born v. Union Elevator Co.*, 97, 101 (1).
68. *Questions of Fact.*—The decision of the trial court on a question of fact, if supported by some evidence, is conclusive on appeal. *Wacker v. Essex*, 584, 593 (5).
69. *Ruling on Motion to Set Aside Default.—Evidence.—Verified Motion.—Consideration.*—A verified motion to set aside a default partakes of the nature of a deposition and parol testimony, and is within the rule against weighing evidence on appeal. *Daub v. Van Lundy*, 468, 473 (3).
70. *Ruling on Motion to Set Aside Default Judgment.—Evidence.—Sufficiency.*—Where it appeared from a verified affidavit to set aside a default judgment that such judgment was entered after failure of affiant's attorneys to comply with a rule absolute to answer, a mere showing that affiant's attorneys had entered into an agreement outside of court with an attorney of the opposing party granting further time to comply with the rule, was insufficient to show mistake, surprise, inadvertence or excusable neglect entitling affiant to relief under §405 Burns 1914, §396 R. S. 1881. *Daub v. Van Lundy*, 468, 474 (5).
71. *Witnesses.—Credibility.—Jury Question.*—The credibility of witnesses and the weight to be given their testimony are questions for the jury, and not for the court on appeal. *Patton v. Cooper, Admr.*, 664, 666 (1).

(D) HARMLESS ERROR.

See also HIGHWAYS 2.

72. *Complaint.—Absence of Allegations.*—Where defendant in an action to recover possession of real estate alleged in his answer that the property involved was situated in Marion county, Indiana, he was not deceived or misled by the absence from the complaint of an allegation specifically locating the property in such county. *Little v. Hoffman*, 371, 374 (3).
73. *Complaint.—Motion to Make More Specific.—Ruling.*—Error, if any, in overruling a motion to make the complaint more definite and certain was harmless, where the facts alleged were sufficiently specific to inform defendant of its theory and claim, and the pleading showed that the facts desired were as fully known to him as to plaintiffs, and it appears from the record that defendant was permitted to testify fully concerning the matter which he asked to have more definitely averred. *McMahan v. Terkhorn*, 501, 504 (1).
74. *Demurrer.—Ruling on.*—The overruling of a demurrer to the reply of the plaintiff holder of a certificate of deposit, assigned as error on the ground that the reply failed to allege an unrestricted indorsement by the owner, was harmless where the record shows that the indorsement was in due form and unrestricted. *Krieg v. Palmer Nat. Bank*, 677, 693 (8).

APPEAL—Continued.

75. *Duplicating Instructions.*—Although the repetition of the same proposition in a number of instructions is not good practice, it will not constitute reversible error, where such instructions were not erroneous and there was nothing in the instructions or in the record to show that appellant was harmed, since it cannot be presumed in such case that the instructions were harmful.

Miller v. Rayburn, 564, 568 (2).

76. *Admission of Evidence.*—In an action to enjoin defendant from using plaintiff's telephone line, and to recover damages for trespass, even though evidence as to what the uninterrupted use of the telephone line would be worth per month was incompetent, its admission was harmless, where no question as to the amount of damages recovered was presented by the motion for a new trial.

Fisher v. Carey, 438, 446 (8).

77. *Admission of Evidence.*—In an action to enjoin defendant from using plaintiff's telephone line, error, if any, in the admission of evidence as to defendant's general appearance on a certain occasion whether he was friendly or angry, was harmless.

Fisher v. Carey, 438, 446 (9).

78. *Exclusion of Evidence.*—Error, if any, in the exclusion of offered testimony was harmless, where the facts sought to be elicited from the witnesses were specifically found by the jury in answer to special interrogatories.

Evansville, etc., R. Co. v. Scott, 121, 143 (12).

79. *Instruction.*—In an action for injuries sustained in a fall on an icy sidewalk, where the evidence and the jury's answers to interrogatories affirmatively showed plaintiff's contributory negligence, error, if any, in instructions relating to defendant's duty and its negligence with reference to the removal of obstructions from the sidewalk, and its power to enter upon private property to make repairs, was harmless, and not ground for reversal.

Diffenderfer v. City of Jeffersonville, 10, 15 (5).

80. *Instructions Beyond Issues.*—In an action for damages to land caused by the obstruction of flood waters of a river, error in the instruction in reference to the subject of surface water being involved, which was beyond the issues, was harmless to defendants, where the jury was fully informed upon the question of flood waters of the main channel and the answers to interrogatories disclosed that the injury was, in fact, caused by such waters.

Evansville, etc., R. Co. v. Scott, 121, 147 (15).

81. *Refusal of Instructions.*—Refusal of the trial court to give a tendered instruction to the effect that the law does not prescribe when the jury should answer the interrogatories submitted to them either before or after agreeing upon the general verdict, and that they could be answered according to the jury's desire, was harmless.

Evansville, etc., R. Co. v. Scott, 121, 146 (14).

82. *Instructions.*—Appellant cannot be heard to complain of errors in an instruction which is favorable to him.

Pennsylvania Co. v. Stalker, Admr., 329, 349 (9).

83. *Instructions.*—The giving of an instruction which is open to criticism, but the infirmities of which are not of a kind as would likely be prejudicial or harmful, is not a ground for a reversal in view of §700 Burns 1914, §658 R. S. 1881, inhibiting reversals for errors which are merely technical.

Vandalia R. Co. v. Stevens, 238, 262 (8).

APPEAL—Continued.

84. *Instructions.*—In an action for personal injuries, error, if any, in instructions because omitting any reference to contributory negligence was harmless, where there was no evidence of such negligence. *Evansville, etc., R. Co. v. Hoffman*, 571, 575 (3).
85. *Instructions.*—Error, if any, in an instruction permitting the jury, in determining questions of fact, to consider evidence not bearing thereon was harmless, where appellant failed to point out any evidence which could have improperly influenced the jury in their determination of the questions covered by the instruction. *Evansville, etc., R. Co. v. Hoffman*, 571, 578 (7).
86. *Instructions.—Conflict.*—Any conflict between a correct instruction and an erroneous one given at appellant's request, which was more favorable to it than the law warrants, is harmless. *Evansville, etc., R. Co. v. Hoffman*, 571, 580 (10).
87. *Law of the Case.*—The contention that a former opinion which was the law of the case should have been so construed as to permit a defendant to invoke the laws of a foreign state as a defense, is of no avail where the record shows that such defendant was permitted to plead, and offer in evidence, the laws of such state without objection, though the finding was against such defense. *Krieg v. Palmer Nat. Bank*, 677, 682 (4).
88. *Sustaining Motion for Peremptory Instruction.*—The action of the trial court in sustaining defendant's motion for a peremptory instruction does not constitute reversible error, since the mere sustaining of the motion was not harmful to plaintiff, but the substantial and available error, if any, being in instructing the jury to find for the defendant. *Smith, Adm., v. Cleveland, etc., R. Co.*, 397, 408 (8).

(E) WAIVER OF ERROR.

See also 8, 28, 38: TRIAL 7.

89. Alleged error is waived by failure to properly present it on appeal. *Evansville, etc., R. Co. v. Hoffman*, 571, 581 (11).
90. *Briefs.—Evidence.*—In an appeal in an action for possession of real estate, where the appellant defendant failed to set out in his briefs the motion for new trial or its substance, or to show that any exception was taken to the ruling on such motion, and failed to set out a condensed recital of the evidence or a written lease, or its substance, relied upon as a defense, the brief not purporting to state the substance of the evidence, but announced only conclusions of counsel as to the effect of the testimony of the witnesses, and failed to mention some of the witnesses or to set out any of their testimony, any question depending on a consideration of the evidence was thereby waived. *Shay v. Goins*, 674, 675 (2).
91. *Failure to Reserve Exception.*—Error, if any, in the action of the trial court striking out certain interrogatories to the jury is waived, where appellant fails to show that she reserved any exception to the court's ruling and the question is not otherwise presented in her brief. *Smith, Adm., v. Cleveland, etc., R. Co.*, 397, 408 (7).
92. *Presenting Questions.*—An assignment of error that the complaint does not state sufficient facts to constitute a cause of action presents no question for review, in view of Acts 1911 p. 415, §348 Burns 1914. *Eads v. Kumley*, 361, 363 (2).

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93. *Ruling on Demurrer.—Briefs.*—An assignment of error that the court erred in overruling a demurrer to the complaint is waived where the appellant fails to set out in his brief either the complaint or the demurrer, or to state any proposition indicating wherein the complaint is insufficient.

Shay v. Goins, 674, 675 (1).

(F) SUBSEQUENT APPEALS.

See also 87.

94. *Law of the Case.*—An opinion on a former appeal is the law of the case as to all questions presented and decided.

Krieg v. Palmer Nat. Bank, 677, 682 (3).

APPLICATION—

Of payment, priority, see **PAYMENT**.

ARCHITECTS—

Certificates, conclusiveness, see **CONTRACTS** 2, 3, 5.

ASSIGNMENTS OF ERROR—

See **APPEAL** 23-27.

ATTORNEY'S FEES.

Sale contract, right to recover, see **CONTRACTS** 7.

AUTOPSY—

See **MASTER AND SERVANT** 24-27.

BANKRUPTCY—

1. *Bankrupt's Estate.—Partition Proceedings in State Court.—Validity.*—An action for partition of the bankrupt's lands instituted in the state court by the trustee in bankruptcy against the bankrupt's wife, wherein he asks to have the real estate sold, is not void, even though the federal court had previously ordered a sale of the bankrupt's undivided interest and the wife is fully protected in the benefits flowing to her from the partition proceedings.

Harlin, Gdn., v. American Trust Co., Trustee, 213, 224 (10).

2. *Bankrupt's Estate.—Title and Possession of Trustee.*—Under the Bankruptcy Act, July 1, 1898, §70, §9654 Comp. Stat. 1916, vesting a trustee in bankruptcy with the title of the bankrupt, and §21 of the act, §9065 Comp. Stat. 1916, making a certified copy of the order approving the trustee's bond conclusive evidence of the vesting in him of the bankrupt's title, the trustee takes an absolute title carrying with it the right of possession.

Harlin, Gdn., v. American Trust Co., Trustee, 213, 221 (3).

3. *Bankrupt's Land.—Partition.—Jurisdiction of Federal Court.*—A federal district court cannot authorize a trustee in bankruptcy to sell the wife's undivided interest in the bankrupt's lands, and can, at the most, only order the sale of the bankrupt's undivided interest.

Harlin, Gdn., v. American Trust Co., Trustee, 213, 223 (7).

4. *Bankrupt's Lands.—Trustee's Right to Partition.*—Under §1243 Burns 1914, §1186 R. S. 1881, providing that any person holding lands as joint tenant, or tenant in common, whether in his own

BANKRUPTCY—Continued.

right or as executor or trustee, may compel partition thereof, a trustee in bankruptcy, who takes an absolute title to the bankrupt's estate, can maintain an action for partition against the bankrupt's wife, who has acquired an absolute interest in his lands on the adjudication or bankruptcy.

Harlin, Gdn., v. American Trust Co., Trustee, 213, 222 (4).

5. *Bankrupt's Lands.—Partition.—Jurisdiction of State Courts.*—An action by a trustee in bankruptcy seeking partition against a bankrupt's wife is a controversy arising out of the settlement of the estate of a bankrupt, as distinguished from a proceeding in bankruptcy proper, so that the state courts, and not the district federal court, have jurisdiction for the purpose of making the partition.

Harlin, Gdn., v. American Trust Co., Trustee, 213, 223 (6).

6. *Bankrupt's Lands.—Adjudication.—Effect on Wife's Interest.—Right to Partition.*—Although during the life of the husband the wife's interest in his lands given her by §§3014, 3029 Burns 1914, §§2483, 2491 R. S. 1881, is inchoate and does not entitle her to assert title, under §3052 Burns 1914, §2508 R. S. 1881, such interest, on judicial sale of her husband's land, becomes absolute when not directed by the judgment to be sold or barred by such sale, and entitles her to partition as soon as his title is transferred by an adjudication to the trustee of the husband's estate in bankruptcy, and before the trustee has made a sale.

Harlin, Gdn., v. American Trust Co., Trustee, 213, 218 (2).

7. *Complaint in Partition.—Sufficiency.—Permission to Sue.*—In an action in partition by a trustee in bankruptcy, the complaint need not aver that he had obtained permission from the federal court to bring the suit, since he derives his right to sue from the Bankruptcy Act, July 1, 1898, §23, §9607 Comp. Stat. 1916.

Harlin, Gdn., v. American Trust Co., Trustee, 213, 224 (11).

8. *Conflict of Jurisdiction.—State and Federal Courts.*—A conflict of state and federal courts does not arise out of the fact that, prior to the filing in the state court of a complaint for partition by a trustee in bankruptcy against the bankrupt's wife, the federal court had ordered the trustee to sell bankrupt's undivided interest, the trustee having decided that partition would be more advantageous to the creditors, and that he would not, therefore, pursue the order of sale made by the federal court.

Harlin, Gdn., v. American Trust Co., Trustee, 213, 223 (9).

9. *Conflict of Jurisdiction.—State and Federal Courts.*—Where the jurisdiction of a state court is invoked in a proceeding which involves a matter pertaining to the settlement of a bankrupt's estate, it should cautiously and in a spirit of judicial comity and courtesy inquire whether to act will result in a conflict of the courts, and, if it will not, the state court should then entertain the action and proceed to determine the controversy, but it will not be justified in arbitrarily refusing to act merely because a pleading bears on its face a suggestion of a possible conflict.

Harlin, Gdn., v. American Trust Co., Trustee, 213, 223 (8).

10. *Federal Bankruptcy Act.—Administration.—Enforcement of State Laws.*—The Bankruptcy Act, July 1, 1898, ch. 541, 30 Stat. at L. 544, recognizes, and the federal courts in the administration of it enforce the laws of the states affecting dower, exemptions, the validity of mortgages and priorities of payment.

Harlin, Gdn., v. American Trust Co., Trustee. 213, 218 (1).

BANKS AND BANKING—

Insolvent Trust Company.—Claims.—Priority.—Guardianship Funds.—Upon the insolvency of a trust company organized under §4942 Burns 1914, Acts 1893 p. 344, money received by it in its capacity as guardian is not entitled to preference over claims of general creditors, where it appears that all money received by it, including that received as guardian, was commingled and placed in a common fund, so that no amount received by the trust company as guardian could be traced, except that it became a part of such common fund.

Wainwright Trust Co. v. Dulln, Rec., 476.

BASTARDS—

1. *Appeal.—Review of Judgment.—Presumptions.*—Under §1027 Burns 1914, §992 R. S. 1881, relating to the order for maintenance in a bastardy proceeding and providing that the money shall be paid to the mother, or, if she be dead or an improper person, to such other person as the court may direct, and §1032 Burns 1914, §1009 R. S. 1881, providing that the death of a bastard shall not be cause for abatement, or bar to any prosecution for bastardy, the court on appeal will not presume, to sustain a judgment in a bastardy proceeding in favor of a third person, that either the mother or child is dead, or that the mother is an improper person to receive payments on such judgment.

Price v. State, ex rel., 1, 7 (4).

2. *Judgment.—Conformance to Statute.—Necessity.*—As a bastardy proceeding is statutory, a judgment which is plainly unauthorized by and contrary to the statute is void.

Price v. State, ex rel., 1, 9 (5).

3. *Judgment.—Payment.—Use of Money.*—Under §1026 Burns 1914, §991 R. S. 1881, providing that, if the defendant in a bastardy proceeding is found to be the father of the child, or shall confess the same, he shall be adjudged the father and stand charged with its maintenance and education, and §1027 Burns 1914, §992 R. S. 1881, providing that the court shall make such order as may seem just for securing the child's maintenance and education, by the annual payment to the mother, or, if she be dead or an improper person to receive the same, to such other person as the court may direct, of such sums of money as may be adjudged proper, the only judgment authorized is one securing the child's maintenance and education, and a judgment in a bastardy proceeding that the defendant pay to the clerk of the court, for the use of a doctor, for a surgical operation, a specified sum, is void.

Price v. State, ex rel., 1, 6, 8 (3).

BENEFICIARIES—

See **INSURANCE** 11-15.

Actions for wrongful death, complaint sufficiency, see **DEATH**.

BILLS AND NOTES—

See also **ALTERATION OF INSTRUMENTS**; **APPEAL** 74; **PARTNERSHIP**; **PLEDGES**; **PRINCIPAL AND SURETY**.

1. *Bill of Exchange.—Action Against Drawer or Indorser.—Evidence.*—A bona fide holder for value of a purported bill of exchange, which does not show to whom it is payable, may main-

BILLS AND NOTES—Continued.

tain an action thereon against the persons who executed or indorsed it, and under appropriate averments may show by parol from whom the consideration moved, to whom the instrument was delivered by the maker or indorser, and who is in fact the owner and *bona fide* holder, and all facts attending the execution and transfer of the instrument.

Hubbard v. First State Bank, etc., 47, 58 (3).

2. *Bona Fide Purchaser.—Verdict.—Special Interrogatories.—Conclusion.*—In an action by the holder of a certificate of deposit, in which the defense relied on the fraud of a third party in acquiring the certificate from the original payee and the plaintiff relied on the pleading and proof of facts which it contends show it to be a *bona fide* purchaser, the answers to special interrogatories are reviewed and held not in conflict with the general verdict for the plaintiff. *Krieg v. Palmer Nat. Bank*, 677, 694 (9).

3. *Certificate of Deposit.—Negotiability.*—Certificates of deposit when made in negotiable form are negotiable, and subject in general to the rules governing negotiable paper.

Bingham, Rec., v. Newtown Bank, 266, 268 (1).

4. *Certificates of Deposit.—Negotiability.—Contingencies.*—The fact that money deposited with a bank was made payable on the return of a certificate of deposit was not such a contingency as affected the negotiable character of the instrument.

Bingham, Rec., v. Newtown Bank, 266, 269 (2).

5. *Certificate of Deposit.—Negotiability.—Place of Payment.*—An instrument issued by an Indiana bank at the top of which, above the name of the bank appeared the words, "Certificate of Deposit," certifying that a named company had deposited "in this bank" a specified sum of money, "payable to the order of self," and due on a certain date, "on the return of this certificate properly endorsed," sufficiently showed, as required by the statute existing in 1912 in order that the instrument be negotiable that it was payable at an Indiana bank, and it was negotiable as an inland bill of exchange. *Bingham, Rec., v. Newtown Bank*, 266, 269 (3).

6. *Certificate of Deposit.—Pleading.—Holder in Good Faith.*—That plaintiff was a purchaser in good faith of a certificate of deposit, negotiable as an inland bill of exchange, before maturity, for value and without notice of any defenses or claims in due course, was a sufficient reply to an answer alleging that the certificate was negotiable without the authority of the payee.

Bingham, Rec., v. Newtown Bank, 266, 270 (4).

7. *Certificates of Deposit.—Transfer.—Bona Fide Purchaser.—Liability.*—Where the owner of a certificate of deposit, nonnegotiable under the law merchant, transferred it by unrestricted indorsement to a third person and the third person, though he acquired the certificate fraudulently, transferred it to the plaintiff in due course by unrestricted indorsement for a valuable consideration, the latter having no knowledge of prior equities or defenses and relying on the indorsement, the legal title to the certificate vested in the plaintiff, independently of its negotiability under the law merchant, and the owner must bear the loss and is estopped to deny the plaintiff's title, since he placed it within the power of the third person to work the injury.

Krieg v. Palmer Nat. Bank, 677, 685, 692, 693 (7).

8. *Certificates of Deposit.—Transfer by Indorsement.*—An assignment of a certificate of deposit by unrestricted indorsement and

BILLS AND NOTES—Continued.

delivery invests the holder with the legal title to the certificate and confers the right to recover thereon, unless such right is defeated by some equitable principle that may be invoked by the original payee to defeat such recovery.

Krieg v. Palmer Nat. Bank, 677, 685 (5).

9. *Incomplete Note.—Actions on.—Issues.—Evidence.*—In an action against the maker and indorser of a note from which the name of the payee and the date of execution had been omitted, where the complaint alleged that the omissions were by mistake of the parties and the scrivener and that the note was given to be used as collateral security, evidence showing the circumstances under which the note was signed, and the intention of the parties was admissible.

Hubbard v. First State Bank, etc., 47, 63 (5).

10. *Incomplete Note.—Actions on.—Supplying Omissions.—Evidence.*—Though a note is incomplete by reason of the absence of the name of the payee and the date of execution, it may nevertheless support a valid obligation, and in a suit thereon, under allegations in the complaint that the omissions were by mutual mistake of the parties, the date of execution could be properly inquired into and ascertained from the evidence.

Hubbard v. First State Bank, etc., 47, 59 (4).

11. *Incomplete Note.—Negotiability.—Statutes.*—A note, incomplete by reason of the omission of the date of execution and the name of the payee, is negotiable under §§9071, 9072 Burns 1914, §§5501, 5502 R. S. 1881, so as to vest the property in an assignee or *bona fide* holder for value.

Hubbard v. First State Bank, etc., 47, 57 (2).

12. *Incomplete Note.—Negotiability.*—A note, incomplete by reason of the omission therefrom of the date of execution and the name of the payee, is not negotiable under the law merchant in Indiana.

Hubbard v. First State Bank, etc., 47, 57 (1).

13. *Negotiable Note.—Assignment.—Right to Sue.—Statutes.*—Under §§9071, 9072 Burns 1914, §§5501, 5502 R. S. 1881, providing that all promissory notes, bills of exchange, etc., signed by any person who promises to pay money, shall be negotiable by indorsement and that the assignee may recover in his own name, where one furnished the money intended to be raised by the use of an incomplete note, he obtained a definite interest in the note which he could assign to a bank for a valuable consideration, whereby it became the real party in interest and entitled to collect whatever was due upon the obligation.

Hubbard v. First State Bank, etc., 47, 64 (6).

14. *Promissory Notes.—Actions.—Defenses.—Fraud.—Burden of Proof.*—In an action on a promissory note, where defendant alleged that the execution of the note was procured by fraud, he had the burden of proof on that issue.

Leslie v. Ebner, Admr., 32, 41 (7).

15. *Transfer by Indorsement.—Defenses.*—The nonnegotiability of an instrument under the law merchant does not affect its assignability, nor defeat the transfer of the legal title by indorsement and delivery, though certain defenses are available against it that are not available against the holder of an instrument negotiable by the law merchant.

Krieg v. Palmer Nat. Bank, 677, 685 (6).

BONDS—

Time for filing, statute, see **APPEAL** 14, 18.

Construction bonds, see **BRIDGES**.

BRIDGES—

1. *Construction.—Bonds.—Materials Used.*—A county, by virtue of its implied powers, may require a construction bond with conditions broader than those required by statute; hence, in an action against the contractor and his bondsmen, a materialman may recover for materials furnished and used in the construction of a bridge, if covered by the bond, although they form no part of the structure. *Guthrie v. State, ex rel.*, 631, 634 (2).
2. *Construction.—Contractor's Bond.—Action.—Evidence.*—Evidence establishing that the plaintiff sold to the defendant, a bridge contractor, certain materials for the construction of a bridge and delivered the materials at the bridge, that they were not paid for, and that the amount due was found by the court, is sufficient to establish a *prima facie* case against the contractor and his bondsmen. *Guthrie v. State, ex rel.*, 631, 634 (1).

BRIEFS—

See **APPEAL** 28-38.

BROKERS—

1. *Definition.*—A broker is a negotiator between other parties, and as such does not act in his own name. *Johnson, Ins. Comr., v. Schrepferman*, 606, 609 (2).
2. *Character of Acts.—Proof of Relation.—Inference.*—The character of a broker's relation to a given transaction may be proved like any other fact, either by direct evidence or by the proof of facts which warrant an inference as to such relation. *Johnson, Ins. Comr., v. Schrepferman*, 606, 610 (3).
3. *Exchange of Real Estate.—Commission Contract.—Right to Compensation.*—Under a contract to pay commission, "for trading my 615 acres farm" at a certain place for a garage in another city, the agent was entitled to a commission on the exchange of such farm for the garage mentioned, although he merely furnished the customer and the owner closed the deal, which included the conveyance of additional land and making various arrangements as to incumbrances, without consulting the agent. (*Wellinger v. Crawford* [1911], 48 Ind. App. 173, distinguished.) *Herr v. McConnell*, 529, 532 (2).
4. *Sale of Real Estate.—Commission Contracts.—Description of Real Estate.—Sufficiency.—Statute.*—A written contract, "I hereby agree to pay * * * for trading my 615 acres farm at Hopkins Park, Ills." sufficiently described the land to satisfy the requirements of §7463 Burns 1914, Acts 1913 p. 638, providing that contracts for commissions for the sale or exchange of real estate shall not be valid unless in writing and that any general reference to the real estate sufficient to identify the same shall be deemed to be a sufficient description thereof. *Herr v. McConnell*, 529, 531 (1).

BUILDING CONTRACTS—

See **CONTRACTS**.

CANCELLATION OF INSTRUMENTS—

1. *Deed.—Improvident Conveyance of Property.—Evidence.*—In an action to cancel a deed for fraud and undue influence, where the complaint contains allegations sufficient to present the issue that the conveyance was without consideration and improvident, plaintiff was entitled to prove the cost of the reasonable care, attention and maintenance required by her, and the amount of her annual income. *Keller v. Cox*, 381, 392 (11).
2. *Deed.—Issues.—Proof.—Pleading Distinct Grounds of Relief.*—In an action to set aside a deed for fraud and undue influence, allegations in the complaint that the conveyance was without consideration and improvident, whether viewed as related to the charge of fraud or undue influence, or as stating a separate ground of recovery, presented issuable facts which plaintiff had a right to prove by competent evidence, since under the Code a plaintiff may in a single paragraph aver all the facts relating to the transaction in controversy and may recover on proof of such part of the facts averred as constitute a ground of recovery, though the complaint may also charge other facts, not proved, which if proved would likewise authorize a recovery. *Keller v. Cox*, 381, 387 (8).

CARRIERS—

See also RAILROADS; STREET RAILROADS.

1. *Carriage of Passengers.—Complaint.—Sufficiency.—Relation of Carrier and Passenger.*—In an action against a railroad for personal injuries sustained by plaintiff while riding on a miner's train, a complaint alleging that "plaintiff took passage on one of defendant's said passenger trains upon said railroad, to be carried" to a certain city, is sufficient as against a demurrer on the ground that it did not show that plaintiff was a passenger and such allegation is strengthened rather than weakened by a further averment that plaintiff was required to pay only \$1.50 a month for passage. *Vandalia R. Co. v. Stevens*, 238, 241 (1).
2. *Carriage of Passengers.—Common Carrier.—Limitation of Liability by Contract.*—Where a railroad company ran a branch line from its main line to a coal mine and operated thereon regular passenger and freight trains, and the owners of the mine contracted with the railroad for exclusive daily carriage of the miners to and from work, they in turn agreeing with the mine owner that he could deduct \$1.50 per month from their wages for such transportation, which was under the entire control of the railroad, the railroad was a common carrier of passengers, and not a private carrier, so that it could not by contract limit its liability as a common carrier. *Vandalia R. Co. v. Stevens*, 238, 257, 261 (6).
3. *Collisions.—Negligence.—Sufficiency of Evidence.*—In an action for injuries sustained by a passenger in a collision between a street car and a runaway team, the evidence is reviewed and held sufficient to sustain a verdict against the carrier and the owner of the team for concurrent negligence resulting in the injury. *Fort Wayne, etc., Traction Co. v. Parish*, 597, 604 (5).
4. *Duty to Passengers.—Degree of Care.—Sudden Peril.—Jury Question.*—Where the motorman of a street car driving slowly upon a crossing saw a runaway team suddenly bearing down

CARRIERS—Continued.

upon the car, he is responsible only for such degree of care that an ordinarily prudent person would have exercised under the circumstances; and whether the motorman was guilty of negligence in stopping the car on the crossing, a passenger having been injured by the collision, was a question of fact for the jury to determine under proper instructions.

Fort Wayne, etc., Traction Co. v. Parish, 597, 604 (4).

5. *Negligence.—Liability.—Limiting by Contract.*—Except in cases where a passenger is riding on a gratuitous pass, a common carrier of passengers cannot, by its contract, relieve itself from liability for its own negligence.

Vandalla R. Co. v. Stevens, 238, 260 (7).

6. *Negligence.—Contracts Limiting Liability.—Force and Effect.*—Although a common carrier cannot limit its common-law liability by any general notice, it may, by special contract with the shipper, limit its liability as insurer, but in so far as the special contract attempts to exonerate it from any loss to which its own fault or negligence has contributed, it will be treated as against public policy and void.

Vandalla R. Co. v. Stevens, 238, 252 (3).

7. *Liability.—Limiting by Special Contract.*—A common carrier cannot, by words of its contract, convert itself into a private carrier, where the transportation undertaken and the duties and responsibilities incident thereto are such as are ordinarily incident to a common carrier, but whether in a particular case the common carrier should be treated as a private carrier, does not necessarily depend on whether a special contract was entered into for the carriage, nor upon the wording or provisions of the contract, but rather upon the nature and character of the carriage or transportation contracted for, and whether the duties and obligations flowing therefrom are those which the carrier owed to the individual contractor, as a common carrier or only those which it could be required to perform as a private carrier.

Vandalla R. Co. v. Stevens, 238, 255 (5).

8. *Statute.—Scope.*—Section 5271 Burns 1914, §3925 R. S. 1881, prescribing the duty of railroads as to running trains, etc., and making such companies common carriers, does not contemplate that every carriage of passengers and goods undertaken by them under special contracts, and different from that undertaken by, and required of, such companies, shall be treated as common, rather than private carriage.

Vandalla R. Co. v. Stevens, 238, 253 (4).

9. *Street Railways.—Negligence.—Concurring Causes.*—A complaint alleging that the defendant street railway company stopped its car within the intersection of a street, negligently permitting it to remain on the crossing, which was not a regular stopping place, and that, while the car was standing in such position, a runaway team collided with it, injuring the plaintiff, who was a passenger on the car, that the owner of the team, another defendant, knowingly allowed a spirited team to be hitched to the wagon, that the tongue of the wagon was so defective that it was certain to break and cause the wagon to run against the team, and that the tongue did break causing the team to run away, was sufficient to charge each of the defendants with concurring negligence.

Fort Wayne, etc., Traction Co. v. Parish, 597, 600, 601 (2).

CARRIERS—Continued.

10. *Street Railroads.—Passengers.—Care Required.*—A street railway company owes a passenger on one of its cars the duty of exercising the highest degree of care practicable.

Fort Wayne, etc., Traction Co. v. Parish, 597, 600 (1).

CASES—

Cited, see p. vi.

Reported, see p. iii.

Distinguished, see **BROKERS 3; EXECUTORS AND ADMINISTRATORS 1; MASTER AND SERVANT 29.**

CERTIFICATES OF DEPOSIT—

Negotiability, see **BILLS AND NOTES 4-8.**

CERTIFICATION—

Of record, see **APPEAL 16.**

CERTIORARI—

Writ of, see **APPEAL 43.**

CHATTEL MORTGAGES—

1. *Failure to Record in Time.—Transfer of Property.—Estoppel.*—In an action by the assignee of a chattel mortgage against the purchaser of the mortgaged property, a complaint alleging that, although the mortgage was not recorded within ten days, it was recorded, unreleased and unsatisfied at the time of the purchase and that the defendant recognized its validity by taking into consideration the amount secured by it as a part of the purchase price, was sufficient to overcome the rule that a chattel mortgage not recorded as required by §7472 Burns 1914, Acts 1897 p. 240, is *prima facie* void as to third parties, with or without notice; since, under such a showing, the defendant purchaser was estopped to deny the validity of the mortgage, and the property became the primary fund for the payment of the debt.

Gaumer v. Register Publishing Co., 658, 660, 661, 663 (1).

2. *Recording.—Time.—Validity as to Assignee.*—A chattel mortgage not recorded within ten days, as required by §7472 Burns 1914, Acts 1897 p. 240, being valid as between the parties, is valid as between the mortgagor and an assignee of the mortgage.

Gaumer v. Register Publishing Co., 658, 660 (2).

CITIES—

See **MUNICIPAL CORPORATIONS.**

COLLATERAL ATTACK—

See **APPEAL 24; HIGHWAYS 3, 5.**

COLLATERAL SECURITY—

See **PLEDGES.**

COLLISIONS—

See **CARRIERS 3; RAILROADS; STREET RAILROADS.**

COMMERCE—

Interstate Commerce.—Injuries to Servant.—Federal Employers' Liability Act.—Assumption of Risk.—In all actions for personal injuries governed by the federal Employers' Liability Act of 1908, §8657 *et seq.* Comp. Stat. 1918, 35 Stat. at L. 65, all state laws upon the subject are superseded, and the defense of assumption of risk is abrogated in certain cases.

Pennsylvania Co. v. Stalker, Admr., 329, 336 (1).

COMMISSION—

Contract, right to compensation, see **BROKERS** 3, 4.

COMMISSIONERS—

See **BRIDGES**; **DRAINS**; **HIGHWAYS**.

CONCLUSIONS—

Construction, statute, see **PLEADING** 3.

Of law, exception, effect, see **TRIAL** 27.

CONCURRING CAUSE—

Liability, see **CARRIERS** 9; **NEGLIGENCE**.

CONDEMNATION—

See **EMINENT DOMAIN** 2, 3.

CONDUCT—

Estoppel by, see **ESTOPPEL**.

CONSIDERATION—

Conveyance without consideration, effect as between grantor and grantee, see **DEEDS** 13.

CONSTRUCTION—

See **CONTRACTS** 4; **DEEDS** 1-3; **MECHANICS' LIENS** 1; **PLEADING** 1; **SALES** 1, 2; **STATUTES**; **WILLS**.

CONSTRUCTIVE FRAUD—

Improvident conveyance, equitable relief, see **DEEDS** 14, 15.

CONTRACTORS—

See **CONTRACTS**.

CONTRACTS—

See also **ADOPTION**; **ALTERATION OF INSTRUMENTS**; **APPEAL** 29; **BROKERS** 3; **CARRIERS** 2, 5-7; **CHATTEL MORTGAGES**; **CORPORATIONS**; **DEEDS**; **FRAUD**; **FRAUDS, STATUTE OF**; **INSURANCE**; **PAYMENT**; **PLEDGES**; **SALES**.

1. *Building Contracts.—Waiver of Provision.—Question of Fact.*—Though the provision of a building contract requiring a written demand for an extension of time because of delay of the owner, etc., may be waived, whether there has been such a waiver is a question of fact.
Wacker v. Essex, 584, 593 (4).
2. *Building Contracts.—Architect's Certificates.—Conclusiveness.*—Under a contract which provided that the contractor was to be paid in monthly payments, as the work progressed, eighty-five

CONTRACTS—Continued.

per cent. of the contract price, the remaining fifteen per cent. to be paid thirty days after the work had been "fully completed and accepted by the owner in writing," the architect's certificates as to the final amount due and as to "extras," each certificate reciting that it was not to be considered as an acceptance, but only as an expression of the architect's opinion, were not conclusive on the owner.

Wacker v. Essex, 584, 590 (2).

3. *Building Contracts.—Performance.—Architect's Certificates.—Conclusiveness.*—An architect must act within the scope of his authority in order to bind the owner by certificates as to the amount due for labor and materials.

Wacker v. Essex, 584, 590 (1).

4. *Building Contracts.—Construction.—Extension of Time for Owner's Delay.—Necessity of Written Claim.*—Where a building contract provided that, should the contractor be delayed in the prosecution or completion of the work by the act or neglect of the owner, architect, or other contractor, the time for completion should be extended for a period equal to the time lost, but that no allowance for additional time should be granted unless a claim therefor in writing should be presented to the architect, and there was delay by the owners in clearing the site for the building, the contractor was not entitled to additional time where he made no written claim to the architect for an extension as provided in the contract, but merely wrote him a number of letters complaining of the delay.

Wm. P. Jungclaus Co. v. Ratti, 84, 91 (5).

5. *Building Contracts.—Payments to Contractor.—Certificate of Architect.*—Under a building contract providing that the sum to be paid for material and work was to be paid by the owner to the contractor only upon certificate of the architect, and that all payments should be due when the certificates were issued, except in case of arbitrary or fraudulent refusal or failure of the architect to issue a certificate for final payment, such payment was not due until a certificate therefor had been issued by the architect.

Wm. P. Jungclaus Co. v. Ratti, 84, 96 (7).

6. *Construction.—Extensions of Time for Owner's Delay.—Architect's Authority to Waive Claim.*—A provision in a building contract stipulating that the architect could allow an extension of time for the completion of the work only in event a written request therefor was filed with him by the contractor was for the benefit of the owner as well as the contractor, and the architect had no power to waive the filing of such claim in writing.

Wm. P. Jungclaus Co. v. Ratti, 84, 94 (6).

7. *Sales Contracts.—Attorney's Fees.—Right to Recover.*—Where grain was sold under a written contract upon which was indorsed a receipt for advancements providing for attorney's fees, but the parties subsequently entered into a verbal agreement concerning the sale of grain which did not provide for attorney's fees, and the receipt was satisfied by subsequent transactions, the holder could not recover attorney's fees, though the maker still owed him money on the account.

Born v. Union Elevator Co., 97, 103 (2).

CONVEYANCES—

Deeds, fraud, evidence, see CANCELLATION OF INSTRUMENTS.

By corporations, authority, sufficiency, see CORPORATIONS 1-3.

CORPORATIONS—

See also MUNICIPAL CORPORATIONS.

1. *Conveyances.—Authority of President.*—The president of a corporation merely by virtue of his office is not authorized or does not have the power to execute a deed on behalf of the corporation.
Bickhart v. Henry, 493, 499 (2).
2. *Conveyances.—Authority of President.—Presumptions.*—Where a deed naming a corporation as grantor was signed by its president, who affixed the corporate seal, and there was nothing to indicate that the president had proceeded without authority, it will be presumed that he had authority to execute the deed, in view of §4046 Burns 1914, §3002 R. S. 1881, providing that corporations may elect all necessary officers and define their duties, and since there is no statute making it the specific duty of any certain officer to execute conveyances in behalf of a corporation.
Bickhart v. Henry, 493, 499 (3).
3. *Conveyances.—Form and Sufficiency.—Signing.*—A warranty deed naming a corporation as grantor and reciting that the corporation, "by its president," naming him, "has hereunto set its hand and seal" and signed by "O. S. C., President," is the deed of the corporation, and, though it would have been technically correct to have signed the name of the corporation "by" the proper officer, this was not necessary to make the conveyance effective.
Bickhart v. Henry, 493, 496 (1).
4. *Stock Subscriptions.—Collateral Agreements.—Effect.*—An agreement made by one selling shares of corporate stock that, if the notes given for the stock were paid out of the first dividends declared and that dividends declared on the stock of the company's financial agent might be appropriated for that purpose, did not amount to an agreement that the notes should be treated as a mere loan of the maker's credit, and that they should be required to be paid only from dividends.
Leslie v. Ebner, Admr., 32, 40 (6).
5. *Stock Subscriptions.—Fraud.—Evidence.—Sufficiency.*—In an action on promissory notes given in payment of a stock subscription in a mining company where defendant alleged that the execution of the notes was procured by fraudulent representations by the corporation's financial agent that the company owned valuable mining properties in Mexico, evidence showing that at the time the notes were executed the company had acquired valuable mining properties in Mexico and that it thereafter extended its holdings until it owned five mines, that it had, under the supervision of its engineers, constructed substantial buildings, installed machinery, had done considerable work at a large expense in developing the mines, and partially completed a wagon road to a railroad connection twenty miles away, that the mines had actually produced a large amount of ore bearing gold, silver, iron and copper in paying quantities, and that, until the company was forced to suspend operations because of a civil war in Mexico, its property was of the value of several million dollars, is insufficient to show that the representations alleged were false and fraudulent.
Leslie v. Ebner, Admr., 32, 41 (8).

COSTS—

Moot question, determination of costs, see APPEAL 3.

Judgment for, effect on appeal, see APPEAL 5, 6.

In actions by administrator, how paid, see EXECUTORS AND ADMINISTRATORS 1, 3.

COUNTIES—

See **BRIDGES; DRAINS; HIGHWAYS.**

COURTS—

See **APPEAL; JUSTICES OF THE PEACE; TRIAL.**

State and federal, partition of bankrupt's estate, jurisdiction, see **BANKRUPTCY.**

Power, in divorce action, see **DIVORCE 5.**

CREDITORS—

See **BANKRUPTCY 8; BANKS AND BANKING; SUBROGATION 5.**

CROSS-EXAMINATION—

See **WITNESSES 2.**

CROSSINGS—

See **RAILROADS.**

CUSTOMS—

Instruction ignoring custom, effect, see **STREET RAILROADS 4.**

DAMAGES—

See **DEATH; EMINENT DOMAIN; HIGHWAYS 2; RAILROADS; STREET RAILROADS; TELEGRAPHS AND TELEPHONES; WATERS AND WATER-COURSES.**

DANGEROUS MACHINERY—

Guarding, statute, see **MASTER AND SERVANT, 2, 4-6.**

DEATH—

See also **APPEAL 51; EXECUTORS AND ADMINISTRATORS 3; MASTER AND SERVANT 15.**

1. *Wrongful.—Actions.—Complaint.—Allegations as to Beneficiaries.—Statute.*—In an action under §285 Burns 1914, Acts 1899 p. 405, brought for the benefit of dependent next of kin, it is only necessary to allege such facts on that subject as will show that some one or more of such beneficiaries exist.

Smith, Adm., v. Cleveland, etc., R. Co., 397, 411 (15).

2. *Wrongful.—Actions.—Complaint.—Naming Improper Beneficiaries.—Statute.*—In an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, the fact that certain persons are named in the complaint as next of kin who are not such within the meaning of the statute does not deprive an administrator of his right to maintain the action for the benefit of those who are proper beneficiaries.

Smith, Adm., v. Cleveland, etc., R. Co., 397, 411 (13).

3. *Wrongful.—Actions.—Defenses.—Statute.*—In an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, if next of kin are named or proved who are not beneficiaries within the meaning of the statute, and the damages of such alleged beneficiaries are greater than the damages of the real beneficiaries, the existence of the latter and the amount of damages sustained by them is a proper matter of defense.

Smith, Adm., v. Cleveland, etc., R. Co., 397, 412 (17).

DEATH—Continued.

4. *Wrongful.—Actions.—Parties.—Statute.*—In an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, though the damages inure to the exclusive benefit of the widow, children and next of kin, they have no right to be parties, and cannot compromise or control the action.
Smith, Adm., v. Cleveland, etc., R. Co., 397, 411 (14).
5. *Wrongful.—Actions.—Damages.—Distribution.—Statute.*—In an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, if beneficiaries are named in the complaint, or proof thereof is made under a complaint in general terms, distribution of the recovery is not limited to the persons actually entitled to receive the same under the statute, even to the exclusion of the persons so named or proved; such questions being for the determination of the court having probate jurisdiction.
Smith, Adm., v. Cleveland, etc., R. Co., 397, 412 (18).
6. *Wrongful.—Actions.—Damages.—Evidence.*—In an action for wrongful death, evidence that decedent was an industrious, successful and experienced farmer was admissible as bearing on the damages to decedent's next of kin, part of whom lived with him on a farm owned jointly by them.
Smith, Adm., v. Cleveland, etc., R. Co., 397, 420 (33).
7. *Wrongful.—Actions.—Directed Verdict.—Evidence.—Contributory Negligence.*—Where one rightfully on the premises of a railroad was killed at its station, mere absence of evidence of the exercise of reasonable care by decedent would not authorize a directed verdict for the railroad in an action for the death, but only such affirmative evidence as would impel but one inference—that of contributory negligence when considered by reasonable minds. *Smith, Adm., v. Cleveland, etc., R. Co., 397, 418 (29).*
8. *Wrongful.—Actions.—Beneficiaries.—Proof.*—Where, in an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, the complaint named three aunts of decedent as the nearest of kin who were dependent upon him for support, proof of the nonexistence of grandchildren or other next of kin was not necessary to a recovery.
Smith, Adm., v. Cleveland, etc., R. Co., 397, 413 (19).
9. *Wrongful.—Actions.—Existence of Beneficiary.—Allegation and Proof.—Statute.*—In an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, it is unnecessary to name in the complaint the persons entitled to the damages, it being sufficient to allege and prove the existence of such persons.
Smith, Adm., v. Cleveland, etc., R. Co., 397, 411 (11).
10. *Wrongful.—Actions.—Existence of Beneficiary.—Allegation and Proof.—Statute.*—Damages recovered under §285 Burns 1914, Acts 1899 p. 405, giving a right of action for wrongful death, inures to the exclusive benefit of the widow or widower, and children, if any, or next of kin, and if no such persons exist, the action cannot be maintained, so that the existence of some such beneficiary must be alleged and proved.
Smith, Adm., v. Cleveland, etc., R. Co., 397, 410 (10).
11. *Wrongful.—Actions.—Failure to Name Beneficiaries in the Complaint.—Distribution of Damages.*—In an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, the failure to name in the complaint certain persons who are entitled to share in the damages does not prevent them from participating in the distribution.
Smith, Adm., v. Cleveland, etc., R. Co., 397, 411 (12):

DEATH—Continued.

12. *Wrongful.—Actions.—Identity of Beneficiaries.—Pleading.*—In an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, the identity of the beneficiaries only becomes important in determining the amount of damages, but such proof can be made under allegations of their existence made in general terms.
Smith, Adm., v. Cleveland, etc., R. Co., 397, 412 (16).
13. *Wrongful.—Contributory Negligence.—Statutes.*—In an action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, it is not necessary for plaintiff to allege or prove want of contributory negligence on the part of decedent, since contributory negligence in such an action is made a matter of defense by the provisions of §362 Burns 1914, Acts 1899 p. 58.
Smith, Adm., v. Cleveland, etc., R. Co., 397, 417 (26).
14. *Wrongful.—Contributory Negligence.—Jury Question.—Directing Verdict.*—As a rule, in actions for wrongful death, decedent's contributory negligence is a question for the jury, and only becomes a question of law for the court when the circumstances are such that but one inference can be drawn by reasonable minds with reference to decedent's conduct upon the particular occasion, and if there is evidence indicating contributory negligence, regardless of its weight and character, the court is not justified in directing a verdict against plaintiff if there is evidence to the contrary, though such evidence is apparently overborne by other evidence more convincing.
Smith, Adm., v. Cleveland, etc., R. Co., 397, 417 (27).
15. *Measure of Damages.*—In an action for wrongful death, an instruction that damages to the widow for the loss of her husband should be such as would compensate for the pecuniary loss sustained, taking into consideration the deceased's age, health and expectancy of life, and his earning capacity, was proper.
Indianapolis Traction, etc., Co. v. Lee, Esq., 105, 114 (5).

DECEDENTS—

Estates, see EXECUTORS AND ADMINISTRATORS.

Transactions with, evidence, see WILLS 1, 3.

DECLARATIONS—

Authority of agent, proof, see PRINCIPAL AND AGENT 1.

DEEDS—

See also CANCELLATION OF INSTRUMENTS; CORPORATIONS 1-3; FRAUD; QUIETING TITLE.

1. *Construction.—Wills.—Reservation of Life Estate.*—A recital reserving to the grantor, in an instrument in the form of a deed, the possession and control of lands during his lifetime amounts to a reservation of a life estate, and does not characterize the instrument as testamentary.
Kokomo Trust Co. v. Hiller, 611, 620 (3).
2. *Construction.—Wills.—Vesting of Interest.*—An instrument having all the formalities of a deed will be construed as such, and not as a will, where it appears therefrom that the maker intended to convey any interest whatever to vest on its execution.
Kokomo Trust Co. v. Hiller, 611, 618 (1).

DEEDS—Continued.

3. *Construction.—Reservation of Life Estate.—Defeasible Fee.*—An instrument in the form of a deed, which, after reserving a life estate to the grantor, reserved to the grantor the right to sell and convey the land during his lifetime, and provided that at his death the conveyance should be in full force and effect if he should die seized of the land, granted a present estate in fee, subject to a life estate, defeasible by reason of the reserved power, but which ripened into an indefeasible fee by the non-exercise of the power. *Kokomo Trust Co. v. Hiller*, 611, 622 (4).
4. *Delivery.—Peremptory Instruction.—Inference.*—In an action to quiet title, in which, under the particular circumstances, it devolved upon the plaintiffs, who claimed under a will, to establish the invalidity of deeds under which the defendants claimed title, the validity of the deeds depending on the sufficiency of the delivery thereof, there was no error in giving a peremptory instruction for the defendants, in view of proof of undisputed facts which were reasonably susceptible only of the inference that the grantor intended a delivery of the deeds.
Kokomo Trust Co. v. Hiller, 611, 628, 630 (8).
5. *Delivery.—Intention.*—The grantor's intention is the controlling element in determining the question of the delivery of a deed, and such intention may be manifested either by acts or by words.
Kokomo Trust Co. v. Hiller, 611, 625 (6).
6. *Delivery.—Evidence.*—Evidence of decedent's declarations of his intention to give certain lands to his daughter is insufficient to establish the delivery to the daughter of a deed conveying such land.
Smithson v. Bouse, 66, 75 (2).
7. *Delivery.—Necessity.—Intention to Convey.—Materiality.*—A daughter of a decedent cannot recover land by virtue of her father's undelivered deed to her, although the evidence may clearly show that it was decedent's intention to give her the land in question.
Smithson v. Bouse, 66, 76 (4).
8. *Delivery.*—To constitute a delivery of a deed it must pass under the power of the grantee, or some one for his use, with the consent of the grantor.
Smithson v. Bouse, 66, 75 (3).
9. *Delivery.—Evidence.—Deposit in Safety Deposit Box.*—Where decedent executed a deed to his daughter and placed it, together with other papers, in a safety deposit box, without any explanation as to the nature of the papers and without giving any direction as to their disposition, and he received the only key which would open the box, when used in conjunction with the bank's master key, there was no delivery of the deed and it was ineffective to convey title, since it remained in the possession and under the control of decedent. *Smithson v. Bouse*, 66, 72 (1).
10. *Delivery Through Third Person.—Effect.*—Where a deed is delivered through the instrumentality of a third person, the title conveyed relates back to its execution completed by delivery to the grantee.
Kokomo Trust Co. v. Hiller, 611, 620 (2).
11. *Delivery Through Third Person.—Intent.*—Facts showing that the grantor, after signing and acknowledging deeds reserving a life estate, handed them to his attorney, who drew them as directed by the grantor, and instructed the attorney to keep them in his safe for the grantees and to have them recorded and delivered to them immediately upon the grantor's death, expressing a desire at the time that the grantees be informed concerning

DEEDS—Continued.

the deeds, which instructions were fully carried out, were sufficient to show that the grantor intended a delivery of the deeds.

Kokomo Trust Co. v. Hiller, 611, 624, 630 (5).

12. *Delivery to Third Person.—Reservation.—Effect in Determining Intention.*—Where a grantor executed deeds reserving a life estate and handed them to a third party, with instructions to keep them until the grantor's death and then to have them recorded and delivered to the grantees, reserving no control over the deeds, a reservation in each of the deeds of a right to sell and convey the lands was not part of the instructions to the third party, but the reservation and the instructions were distinct propositions, the former dealing with the quantity of estate conveyed and the latter with the disposition of instruments conveying such quantity.

Kokomo Trust Co. v. Hiller, 611, 627 (7).

13. *Validity.—Conveyance without Consideration.*—The fact that a conveyance was made without any valuable consideration is not alone sufficient ground to set aside a deed where the question arises between the grantor and grantee.

Keller v. Cox, 381, 386 (4).

14. *Validity.—Improvident Conveyance.—Equitable Relief.*—Where a weak, aged, or infirm person improvidently conveys her property without receiving any valuable consideration therefor, or for grossly inadequate consideration, thereby depriving herself of means of support, equity will require the reconveyance or restoration of the property, upon demand of the grantor, where the parties may be placed in *statu quo*, and such grantor has done or offers to do that which is necessary to restore the *statu quo ante*.

Keller v. Cox, 381, 389 (9).

15. *Validity.—Constructive Fraud.—Improvident Conveyance.—Equitable Relief.*—The improvident conveyance of property by a weak, aged, or infirm person without receiving a valuable consideration therefor, or for a grossly inadequate consideration, amounts to constructive fraud, and where the question arises between the improvident grantor and the grantee equity will intervene to compel the restoration of such property.

Keller v. Cox, 381, 390 (10).

DEFAULT—

Setting aside, nature of motion, sufficiency, see **APPEAL** 69, 70; **JUDGMENT** 1, 2, 4.

DEFEASIBLE FEE—

Creation of, by reservation of power to sell, see **DEEDS** 3.

DELIVERY—

Determination of question, see **DEEDS** 4-13.

By third person, see **DEEDS** 10-12.

DEMURRER—

See **PLEADING**.

Review of question presented by demurrer, see **APPEAL** 8, 22, 48, 74, 93.

DEPOSITS IN COURT—

See also **INTERPLEADER**.

Effect.—Personal Judgment.—In an action on a certificate of deposit, the original payee and indorser, who asked and was granted permission of being made a party defendant and denied the plaintiff's right to the recovery of money paid into court by the bank issuing the certificate, either from himself as indorser or from the bank as maker of the certificate, is liable for a personal judgment for the amount of the certificate from the date of demand to the time of trial.

Krieg v. Palmer Nat. Bank, 677, 696 (13).

DESCRIPTION—

Defective description of realty in complaint, presumption, see **APPEAL 56**.

Of realty, sufficiency in commission contract, see **BROKERS 4**; sufficiency in lien notice, see **MECHANICS' LIENS**.

DILIGENCE—

In ascertaining facts, see **ESTOPPEL 2**.

DISCRETION—

Of court, see **EXECUTORS AND ADMINISTRATORS 8**.

DISMISSAL—

See **APPEAL 39-46**.

DIVORCE—

See also **APPEAL 43**; **JUDGMENT 3**.

1. **Actions.—Residence Affidavit.—Necessity.**—As the affidavit as to plaintiff's residence, required by §1066 Burns 1914, §1031 R. S. 1881, to be filed in an action for divorce, is made a prerequisite by the statute to the right of divorce, a decree based on an insufficient affidavit is contrary to law and must be set aside.

Hoffman v. Hoffman, 230, 237 (2).

2. **Actions.—Residence Affidavit.—Requirements.—Statute.**—Section 1066 Burns 1914, §1031 R. S. 1881, requiring that plaintiff in an action for divorce shall, with his petition, file an affidavit subscribed and sworn to by himself, stating the length of time he has been a resident of the state, and stating particularly the place, town, city or township in which he has resided for the last two years past, and stating his occupation, is mandatory and must be substantially complied with, and an affidavit filed with a divorce complaint reciting that affiant was the plaintiff, that he had been a resident of the State of Indiana for more than five years last past and for more than six months last past had resided in a named city at a specified address, and that he was by occupation an assembler, did not substantially comply with the requirements of the statute.

Hoffman v. Hoffman, 230, 232 (1).

3. **Decree.—Conformity with Pleadings.**—In an action for divorce, where the defendant by cross-complaint alleged that the complainant, representing that her father would deed certain land to them, persuaded the defendant to move on the land, and that he made improvements thereon by his labor and the investment of his separate earnings, that the plaintiff's father failed to deed

DIVORCE—Continued.

the land to them, but deeded a life estate therein to the plaintiff with the remainder to their children, whereupon the plaintiff and defendant agreed that all the personal property should belong to the defendant, and the prayer asked for an adjudication of the defendant's property rights, a decree apportioning the personalty used by the parties in common was not without the issues.
Wise v. Wise, 647, 650 (2).

4. *Property Rights.—Adjudication.—Appeal.—Presumption.*—Where the question of personal property rights growing out of, and connected with, the marriage relation was tendered by cross-complaint, the appellate court will presume, in the absence of the evidence from the record, that the adjudication of the property rights, as specifically set forth in the decree, referred to property rights within the issues as tendered by the cross-complaint.
Wise v. Wise, 647, 654 (4).

5. *Property Rights.—Adjudication.—Power of Courts.*—In a divorce proceeding, a court having jurisdiction of the parties and the subject-matter has power, if a divorce is decreed, to adjudicate all the property rights growing out of, or connected with, the marriage.
Wise v. Wise, 647, 653 (3).

DOCUMENTARY EVIDENCE—

See EVIDENCE.

DRAINS—

See also INJUNCTION 3.

1. *Establishment.—Legal Remedy to Prevent.—Remonstrance.*—*Prima facie* the statute (§6141 *et seq.* Burns 1914, Acts 1907 p. 508) affords owners of lands within a drainage district, although not named in the petition, a full and adequate legal remedy by remonstrance; and even though there is no remonstrance, or if one is filed and overruled, the establishment of the proposed drainage does not necessarily follow.
Haines v. Trueblood, 456, 463 (4).
2. *Establishment.—Remonstrance.—Equitable Relief.*—In the case of an ordinary petition for drainage the legal remedy by remonstrance is fully adequate, and for that reason alone recourse to equity to enjoin the establishment of the drain should be denied.
Haines v. Trueblood, 456, 465 (7).
3. *Establishment.—Remonstrance.—Right to Drainage.*—Landowners by repeatedly remonstrating against a drainage petition repeatedly filed, and thus successively preventing its reference to the drainage commissioners and procuring its dismissal, do not thereby deprive the petitioners of any right, since there is no absolute right to drainage under any particular petition directed to any particular physical situation.
Haines v. Trueblood, 456, 463 (5).
4. *Establishment.—Petition.—Requisites.—Drainage Commissioners.—Report.—Statute.*—While under §6141 Burns 1914, Acts 1907 p. 508, §2, a petitioner for drainage is required to state generally in his petition his belief respecting the best and cheapest manner in which the proposed drainage may be accomplished, such statement is not binding on the drainage commissioners, since they are required, in case they report in favor of the drainage, to

DRAINS—Continued.

determine all questions of terminus, route, location, etc., of the proposed work, subject, however, to the ultimate determination of the court.

Haines v. Trueblood, 456, 461 (1).

5. *Establishment.—Rights of Landowners.—Petition.—Remonstrance.—Statutes.*—Under §§6141, 6143 Burns 1914, Acts 1907 p. 508, §§2, 4, a petitioner ordinarily has as strong a right to petition for drainage as has a landowner to remonstrate against it, and neither may be heard to complain that the other has exercised the right granted him by statute.

Haines v. Trueblood, 456, 462 (3).

EMINENT DOMAIN—

1. *Damages.*—Where defendant's 178-acre farm, which was divided into separate tracts by a railroad right of way, was operated by him as one farm, and the increased flow of drainage water onto one tract, because of changes in the railroad grade, depreciated the value of the land from about \$90 to about \$85 an acre, damages of \$600, awarded in proceedings by the railroad to condemn land for drainage purposes were not excessive.

Chicago, etc., R. Co. v. Hoffman, 281, 294 (4).

2. *Right of Way Dividing Farm into Separate Tracts.—Condemnation Proceedings.—Measure of Damages.*—Where a farm located on both sides of a railroad right of way was owned and operated as one farm by the owner prior to and at the time of a condemnation proceeding by a railroad to appropriate additional land for drainage purposes under §929 *et seq.* Burns 1914, Acts 1905 p. 59, the measure of damages was the difference in the value of the entire tract before and after the change in drainage; and such rule for the determination of damages was not affected by the fact that the owner purchased part of the land from the railroad with knowledge that it was double tracking its road, which improvement necessitated the appropriation of land involved for drainage purposes.

Chicago, etc., R. Co. v. Hoffman, 281, 290 (2).

3. *Right of Way Dividing Farms into Separate Tracts.—Jury Question.*—In a condemnation proceeding by a railroad to appropriate additional land on which to build a second track, whether a farm, which was on both sides of the right of way and consisted of contiguous tracts, was held and operated as separate units or as a single farm was a question of fact for the jury.

Chicago, etc., R. Co. v. Hoffman, 281, 290 (3).

4. *Taking Railroad Right of Way.—Compensation.—Future Damages.*—The purchase of a railroad company from the owner of an additional right of way to be used in building a second track did not settle or adjust future damages from increased drainage on the grantor's land resulting from the construction of such track, where at the time of the purchase the grantor did not know and could not reasonably have anticipated that the contemplated improvements would cause the diversion of drainage complained of; the rule being that the price paid for a railroad right of way settles future damages applying only to damages which might reasonably be expected to result from the conveyance and the construction and maintenance of the road in a proper and lawful manner.

Chicago, etc., R. Co. v. Hoffman, 281, 289 (1).

EMPLOYERS' LIABILITY—

See MASTER AND SERVANT 10, 15.

Insurance, notice of accident, see INSURANCE 2.

EQUITY—

Equitable relief, see DEEDS 14, 15; DRAINS 2; INJUNCTION 1, 2, 4-7; SUBROGATION 3; SALES 2.

ESTOPPEL—

See ALTERATION OF INSTRUMENTS 1.

Failure to record chattel mortgage in time, estoppel of purchaser, see CHATTEL MORTGAGES.

1. *Estoppel by Conduct.*—Where insured's son prepared an assignment of life policies to insured's brother to induce him to become surety on certain notes and it was contended that the son knowingly included in the assignment an unassignable policy in which he had an interest, and that he was therefore estopped to assert any rights in such policy as against the brother, if what the son said or did in reference to the assignment was such as might have influenced a prudent man and if it did influence the result, the son was estopped to claim any interest in the proceeds of the policy, though other influences operated with his conduct.

Pape v. Pape, 153, 174 (7).

2. *Estoppel by Silence.—Diligence in Ascertaining Facts.*—Where, on insured's manufacturing company, which was managed by his son, becoming financially embarrassed, insured's brother agreed to indorse renewal notes for money owed by insured and the company on condition that policies on insured's life be assigned to him, and the son, being relied on by the brother, who could neither read nor write, to select policies which were assignable, drafted a written assignment of the policy in suit, which was not assignable and in which he had a vested interest, facts unknown to the brother, and the latter, accepting such policy as collateral, was thereby induced to become surety on the renewal notes, and was subsequently compelled to pay the same, the son, having remained silent as to his interest, was estopped to assert any right in the policy involved as against the brother; and, in view of the brother's illiteracy and the fact that the policy was not delivered to him until four months after the assignment, he was not chargeable with lack of diligence in learning the nature of the policy assigned, as the son's failure to assert his rights amounted to affirmative conduct reasonably calculated to mislead insured's brother, so that the son should not be heard to say that the brother was not diligent because he relied thereon.

Pape v. Pape, 153, 169 (5).

EVIDENCE—

See also FRAUDS, STATUTE OF 2. TRIAL 17, 18; WITNESSES.

Review of, see also ADVERSE POSSESSION; APPEAL 9, 21, 29, 42, 52, 56, 57, 62-66, 68, 76-78.

Burden of proof, see also BILLS AND NOTES 14; MASTER AND SERVANT 35, 44; MUNICIPAL CORPORATIONS 1;

Presumptions, see CORPORATIONS 2; PRINCIPAL AND AGENT 2.

1. *Admissibility.—Documentary Evidence.—Identification.*—It is improper to admit in evidence written communications in the

EVIDENCE—Continued.

form of exhibits where they are not sufficiently identified.

Leblie v. Ebner, Admr., 32, 44, (9).

2. *Opinions.—Intent of Others.*—Testimony of a witness as to the intent of another must be confined to acts and declarations showing intention. *Guthrie v. State, ex rel.*, 631, 635 (4).

3. *Opinion Evidence.—Competency.*—In an action to enjoin defendant from using plaintiff's telephone line, if the fact as to whether defendant appeared to be friendly or angry on a certain occasion was material, it was not error to permit a nonexpert to testify to such fact, since it is competent for a nonexpert to give his opinion as to conduct and bearing, whether friendly or hostile.

Fisher v. Carey, 438, 446 (10).

4. *Parol.—Beneficiary of Life Policy.—Intention.*—Where it is necessary to resort to extrinsic oral evidence to aid in arriving at who were intended as beneficiaries of a life policy by any answer in insured's application, the inquiry should be limited to evidence of intention at a date not so remote from the time of the making of the application and the writing of the insurance as to afford time and opportunity for a change of desire and purpose on the part of insured.

Pape v. Pape, 153, 177 (9).

5. *Res Gestae.—Statements of Agent.*—In an action by an insurance commissioner for recovery of a delinquent premium on a policy procured by the defendant through a broker, acts and statements of the broker in reference to the procuring of the policy, the adjusting of the premium and the canceling of the policy, which were within the scope of the broker's authority, are admissible in evidence as part of the *res gestae*.

Johnson, Ins. Comr., v. Schrepferman, 606, 611 (5).

EXCEPTIONS—

Grounds of review, see **APPEAL 10**.

EXCEPTIONS, BILL OF—

See also **APPEAL 20, 21**.

Filing.—Extension of Time.—An extension of time beyond the term in which to file a bill of exceptions containing the evidence must be granted when the motion for a new trial is overruled in order to make the evidence part of the record.

Home Stove Co. v. Bishop, 276.

EXECUTORS AND ADMINISTRATORS—

See also **APPEAL 1**; **PARTNERSHIP**; **WILLS**.

Substitution, voluntary appearance, statutes, see **ABATEMENT AND REVIVAL**.

1. *Actions by.—Costs.*—When an administrator sues in his trust capacity, judgment should be rendered against him in such capacity for costs where he fails in an action, and the costs should be paid from the funds in his hands belonging to the branch of his trust to which such suit pertained, and, if there be no funds in that branch of his trust, the costs must remain unpaid, since they cannot be charged against the administrator personally. (*Brunning v. Golden* [1902], 159 Ind. 199, distinguished.) *Smith, Admr., v. Cleveland, etc., R. Co.*, 397, 423 (36).

2. *Action.—Evidence.—Sufficiency.—Review.*—Where a claim was filed against a decedent's estate on the theory that the decedent received and held a certain sum of money in trust which, after

EXECUTORS AND ADMINISTRATORS—Continued.

the payment of the donor's funeral expenses, was to be paid to the claimant, there could be no recovery under evidence showing only the receipt of the money by the decedent and the payment of the funeral expenses, without establishing the amount of such expenses, since a verdict, in the absence of such evidence, could be returned only by conjecture as to the amount of the deduction for such expenses, and this the jury is not permitted to do.

Patton v. Cooper, Admr., 664, 667 (3).

3. *Administrator's Action for Wrongful Death.—Tazewell Costs of Decedent's Estate.—Statute.*—In an administrator's action for wrongful death under §285 Burns 1914, Acts 1899 p. 405, the trial court had no authority to adjudge, on the administrator's being defeated in the action, that the costs be paid from decedent's estate.

Smith, Adm., v. *Cleveland, etc., R. Co.*, 397, 421 (35).

4. *Claims Against Estate.—Practice.—Motion for New Trial.—Statute.*—Under §2843 Burns 1914, Acts 1883 p. 156, providing that the trial of claims filed against decedents' estates shall be conducted as in ordinary civil cases, the rules of procedure in civil causes should be followed where applicable, so that motions for new trial are contemplated as in civil causes.

Leslie v. Ebner, Admr., 32, 36 (1).

5. *Claims Against Estate.—Time for Taking Appeal.*—In civil causes, which include trials of claims against decedent's estates, the thirty days after decision for filing an appeal bond, as provided by §2978 Burns 1914, Acts 1913 p. 65, begins to run from the time of overruling the motion for new trial when filed after the rendering of judgment. *Leslie v. Ebner, Admr.*, 32, 36 (3).

6. *Failure of Executors to Qualify.—Residuary Legatees.—Right to Petition for Administration.*—Residuary legatees under a will have a legal right to petition for the appointment of an administrator with the will annexed, after the executors named in the will failed to qualify as required by law.

Diedrich v. Way, Admr., 375, 379 (3).

7. *Payment of Debts.—Personalty.—Realty.*—The one-fourth interest in a decedent's estate, including the interest in his real estate which the mother inherits under §3027 Burns 1914, §2489 R. S. 1881, is not subject to sale to make assets to pay the debts of the estate before resorting to other personal property sufficient for that purpose, since §2848 Burns 1914, §2332 R. S. 1881, provides that the real estate of deceased shall be sold to pay debts only when the personal estate of decedent is insufficient for that purpose, and §2927 Burns 1914, §2405 R. S. 1881, further provides that the surplus estate, after payment of debts and expenses, shall be distributed to the legal heirs according to the laws in force at the time of decedent's death.

Gearhart, Adm., v. *Gearhart*, 393.

8. *Removal of Administrator.—Discretion of Trial Court.*—A trial court's refusal to remove a duly appointed and qualified administrator, in the exercise of its discretion, will not be reversed on a mere showing that the court in its discretion might have removed him.

Diedrich v. Way, Admr., 375, 379 (2).

EXHIBITS—

See EVIDENCE 1.

EXPECTANCY—

Of life, as element of damages, see **DEATH** 15.

FACTORY ACT—

See **MASTER AND SERVANT** 2, 4-6.

FEE SIMPLE—

Devise, sufficiency, see **WILLS** 1.

FELLOW-SERVANTS—

See **MASTER AND SERVANT** 20.

FLOODS—

See **WATERS AND WATERCOURSES**.

FOREIGN JUDGMENTS—

Full faith and credit, see **JUDGMENT** 3.

FRAUD—

See also **BILLS AND NOTES** 14; **CANCELLATION OF INSTRUMENTS**; **CORPORATIONS** 5; **DEEDS** 15; **INSURANCE** 8, 10; **VENDOR AND PURCHASER** 2.

Fraud as to Child.—Agreement for Inheritance.—Pleading.—General Averment.—In an action to set aside deeds, a complaint alleging that a child was surrendered by its natural parent to be adopted by another in consideration of an agreement to make such child an heir and that the parent by adoption disposed of her lands to prevent such child from obtaining the same in accordance with the agreement, is insufficient to show fraud; nor is the complaint aided by a general averment of fraud.

Wright v. Green, 433, 438 (4).

FRAUDS, STATUTE OF—

1. *Construction.*—In determining whether a transaction is within the statute of frauds the courts will hold strictly to established rules.

Peoples Outfitting Co. v. Wheeling Mattress Co., 18, 22 (1).

2. *Sale of Goods.—Identity of Property.—Parol Evidence.—Letters.*—A letter, "Ship us the \$66.00 size, as per instructions to your" president, the order referring to comforters, was not sufficient to take the transaction out of statute of frauds, where the issue was as to the quality of goods, a matter which could not, in the absence of pertinent writings or a trade catalogue, be determined without resorting to oral evidence.

Peoples Outfitting Co. v. Wheeling Mattress Co., 18, 22 (2).

3. *Sale of Land.—Parol Contract.—Force.*—A parol agreement that in consideration of the surrender by the natural parent of a child to be adopted by another, such adopted child shall inherit land is a contract for the sale of land and falls within the prohibition of the statute of frauds, §7462 Burns 1914, §4904 R. S. 1881.

Wright v. Green, 433, 437 (1).

4. *Sale of Land.—Parol Contract.—Statute.*—An agreement in parol that an adopted child shall inherit land is not taken out of the control of the statute of frauds, §7462 Burns 1914, §4904 R. S. 1881, by performance on the part of the child by living with the adopted parents in conformity with the agreement.

Wright v. Green, 433, 437 (2).

GUARDIAN AND WARD—

Trust company as guardian, effect of commingling ward's funds,
see **BANKS AND BANKING.**

HARMLESS ERROR—

See **APPEAL 72-88.**

HIGHWAYS—

See also **APPEAL 24.**

1. *Establishment.—Power of Board.*—The board of commissioners, in the establishment of highways, has only such powers as are conferred by statute, and these powers must be employed substantially in the manner prescribed to render the proceedings valid.
Eads v. Kumley, 361, 367 (4).
2. *Enjoining Obstruction.—Complaint.—Sufficiency.—Harmless Error.*—In a suit to enjoin the obstruction of a highway brought by parties owning land abutting on such highway, a complaint failing to allege that any part thereof along the plaintiff's lands was obstructed or that access to such lands was substantially interfered with, but alleged only such damages as those suffered by the public generally, was insufficient; and the overruling of a demurrer to such complaint will not be treated as harmless where the evidence showed damages different only in degree from those sustained by the public generally.
Eads v. Kumley, 361, 368, 369 (6).
3. *Obstruction.—Injunction.—Jurisdiction.—Collateral Attack.*—The circuit court, being a court of general jurisdiction, had jurisdiction of the subject-matter of an action to enjoin the obstruction of a highway; hence, an assignment that the court had no jurisdiction of such action, because it was a collateral attack on a judgment of the board of commissioners, is of no avail, since the court, having jurisdiction of the subject-matter, could properly assume jurisdiction, if for no other reason, to determine whether the action was in fact a collateral attack on such judgment.
Eads v. Kumley, 361, 363 (3).
4. *Obstruction.—Injunction.—Joinder of Parties.*—Parties owning separate tracts of realty could not properly be joined in an action to restrain the obstruction of a highway solely on the ground that both tracts abutted on the highway.
Eads v. Kumley, 361, 370 (8).
5. *Vacation.—Judgment.—Collateral Attack.—Complaint.*—A complaint, in a suit to enjoin the obstruction of a highway, which, in addition to a general allegation that the defendant acted on a void order of the board of commissioners in obstructing such highway, set forth the petition filed with such board, which petition was signed by only one petitioner instead of twelve as required by §7649 Burns 1914, Acts 1905 p. 521, sufficiently showed that the judgment of the board was void and, therefore, subject to collateral attack.
Eads v. Kumley, 361, 368 (5).

HUSBAND AND WIFE—

See also **BANKRUPTCY; DIVORCE; INSURANCE 9.**

IMPEACHMENT—

See **WITNESSES 2.**

INDORSEMENT—

See **BILLS AND NOTES** 1, 7, 8, 15.

INDUSTRIAL BOARD—

See **MASTER AND SERVANT** 23-46.

INJUNCTION—

See also **ADVERSE POSSESSION**; **APPEAL** 44, 54; **HIGHWAYS** 4; **NUISANCE**; **TELEGRAPHS AND TELEPHONES**.

1. *Enjoining Trespass.—Complaint.—Sufficiency.*—In an action to enjoin defendant from using plaintiff's telephone line, and to recover damages for trespass, a complaint alleging that plaintiffs are the owners of a telephone line which defendant has no right or license to use, that he refused to desist in its use on their command, that they cut his line and thereupon defendant reconnected the same, that he is threatening to use plaintiff's line continuously without right, and that such use has deprived and will continue to deprive plaintiffs of the use and enjoyment of their telephone line, showed a trespass continuous in its nature, which would furnish grounds for many actions at law, so that equity would grant injunctive relief to prevent a multiplicity of suits.
Fisher v. Carey, 438, 443 (3).
2. *Grounds.—Multiplicity of Suits.*—Equity may be invoked to prevent a multiplicity of suits or for the purpose of suppressing litigation when otherwise there would be actions at law unnecessarily or burdensomely numerous.
Haines v. Trueblood, 456, 466 (9).
3. *Grounds.—Establishment of Drain.*—Where a landowner fraudulently joined with his attorney in filing repeated and vexatious petitions for the establishment of a drain in order to enable the attorney to collect fees and to repeat the filing of the petition until the opposition would fail to file a remonstrance, the adverse landowners were entitled to injunction restraining the repeated filing of such petition.
Haines v. Trueblood, 456, 466 (10).
4. *Right to Relief.—Multiplicity of Suits.*—Where there is a legal remedy, equity will frequently grant injunctive relief to prevent multiplicity of suits.
Fisher v. Carey, 438, 443 (2).
5. *Right to Relief.—Adequate Legal Remedy.*—That there is a remedy at law is not alone enough to defeat injunction, but the legal remedy must be as plain, complete and adequate as the remedy in equity.
Haines v. Trueblood, 456, 466 (6).
6. *Right to Relief.—Legal Remedy.*—Although a party may have a legal remedy, injunctive relief may be granted if that remedy is not as practicable, efficient and adequate as that afforded by equity, and whether a complaining party has a legal remedy which will afford complete justice must be determined under all the circumstances of the case and in view of the conduct of the parties.
Fisher v. Carey, 438, 442 (1).
7. *Right to Relief.—Adequacy of Legal Remedy.—Determination.*—In determining the adequacy of legal remedies, some weight is given the fact, if it exists, that such remedies are vexatiously inconvenient, or that a denial of equitable relief results in irritation, annoyance and embarrassment which might be relieved by its application.
Haines v. Trueblood, 456, 466 (8).

INSTRUCTIONS—

See TRIAL.

Review of, see APPEAL 50, 51, 79, 80-86; DEATH 15.

INSURANCE—

See also ESTOPPEL; STATUTES; TAXATION.

1. *Agent's Authority*.—In the absence of a special contract to the contrary, a broker who procures insurance which is accepted and issued by the company is the agent of the company, and his acts and representations within the scope of his authority are binding on the company.

Johnson, Ins. Comr., v. Schrepferman, 606, 610 (4).

2. *Employer's Liability Insurance*.—*Notice of Accident*.—*Compliance with Policy Provisions*.—A provision of an employer's liability policy requiring written notice to the insurer or its agent of any claim made on account of accident, is complied with by insured's sending all notices and summons to the general agent who wrote the policy and who sent such notice to the insurer, where insured had received no notice of the revocation of the agent's authority.

Georgia Life Ins. Co. v. Otter Creek Coal Co., 277, 280 (2).

3. *Foreign Insurance Companies*.—*Taxation*.—*Rate*.—*Retaliatory Statute*.—*Enforcement*.—Under §7222 Burns 1914, Acts 1895 p. 319, providing that the auditor of state shall tax for the use of the State of Indiana, the fees, taxes and charges allowed by law, etc., and §4086 Burns 1914, §3773 R. S. 1881, providing that where by the laws of any other state any taxes, fees, etc., or other obligations, are imposed upon insurance companies of this or other states, or their agents, greater than are required by the laws of this state, then the same obligations and provisions shall in like manner be imposed upon all insurance companies of such states and their agents, and §10216 Burns 1914, Acts 1891 p. 199, §67, the primary taxing statute, fixing a rate of two per cent. on the premiums received by foreign insurance companies doing business within the state, if the auditor of state should have before him the fact that the State of New York levies a lower rate on Indiana companies doing business in New York, he is not required by the retaliatory statute to make a corresponding reduction, but in that event he must adhere to the primary law, and it is only upon the happening of the contingency that the taxes imposed upon the insurance companies of Indiana or other states by the New York laws are greater than are required by the laws of this state that the retaliatory statute may be invoked.

State, ex rel. v. Continental Ins. Co., 536, 561 (8).

4. *Foreign Insurance Companies*.—*Privilege Tax*.—*Statute*.—Section 10216 Burns 1914, Acts 1891 p. 199, §67, requiring foreign insurance companies doing business in this state to pay taxes upon their gross premium income, imposes a tax upon a foreign corporation for the privilege of exercising its corporate franchises and carrying on a business in a corporate capacity within the state, and such tax is a graduated privilege tax.

State, ex rel. v. Continental Ins. Co., 536, 550 (5).

5. *Foreign Insurance Companies*.—*Exclusion from State*.—*Powers of Legislature*.—The legislature has the constitutional power to exclude foreign insurance companies from the state.

State, ex rel. v. Continental Ins. Co., 536, 549 (3).

INSURANCE—Continued.

6. *Foreign Insurance Companies.—Taxation.—Retallatory Statute.*—Under §4806 Burns 1914, §3773 R. S. 1881, providing that where by the laws of any other state any taxes, fees, etc., are imposed upon insurance companies of this or other states, or their agents, greater than required by the laws of this state, then the same shall be imposed upon all insurance companies of such states and their agents, a tax law of New York requiring the payment of net premiums to the fire department of cities and incorporated villages by fire insurance companies not organized under the laws of the State of New York, but doing business therein, would not be applicable, since premiums derived from insurance on farm property and on property in towns and villages not having fire companies, are taxed at the rate of two per cent.; the obligation to pay this tax is laid upon the local agent and not upon the company and the agent is liable to forfeiture for failure to discharge the obligation and the funds derived from the tax belonging to the municipality where collected and must be used for the benefit of its fire company or companies.

State, ex rel. v. Continental Ins. Co., 536, 563 (10).

7. *Life Insurance.—Vested Interests.*—Where a life insurance policy contained no provision for a change of beneficiary, the primary beneficiary took a vested interest therein which terminated upon her predeceasing insured.

Pape v. Pape, 153, 168 (3).

8. *Life Insurance.—Action on Policy.—Representations.—Fraud.—Evidence.—Sufficiency.*—In an action on a life insurance policy, where insured had stated in his application that he had never been treated by a physician, the evidence was sufficient to sustain a finding to that effect, though insured had in fact been treated by a doctor some years previous for la grippe, sour stomach and heartburn, there being testimony that such ailments were temporary and would not seriously impair the health.

Reserve, etc., Ins. Co. v. Root, 448, 455 (4).

9. *Life Insurance.—Action on Policy.—Parties.—Widow of Insured.—Legal Heir.*—A woman entitled to share as a distributee of her husband's personalty is within the term "legal heirs" as used in life insurance policies, and was properly joined as a party plaintiff in an action on a life policy.

Reserve, etc., Ins. Co. v. Root, 448, 451, (1).

10. *Life Insurance.—Representations.—Fraud.—Condition of Health.—Medical Attendance.*—Where a life insurance policy provided that, in the absence of fraud, statements made by insured in answer to questions in the application should be deemed representations, and the application contained an agreement that answers therein were material to the risk, a statement made by insured that he had never consulted a doctor, when he had in fact been treated several years previous by a physician for la grippe, sour stomach and heartburn, did not necessarily show fraud, since insured might honestly have interpreted the questions as inquiring whether he had been treated for a serious disease.

Reserve, etc., Ins. Co. v. Root, 448, 452 (2).

11. *Life Insurance.—Interest of Beneficiary.—Evidence.—Admissibility.*—Generally, where a life policy contains no provisions authorizing a change of beneficiary, proof of anything said or done by the insured after the beneficiary's interest has vested is not permissible to defeat the rights of such beneficiary.

Pape v. Pape, 153, 176 (8).

INSURANCE—Continued.

12. *Life Insurance.—Policy.—Interest in Proceeds.—Evidence.—Sufficiency.*—In an action on a life insurance policy involving the rights of plaintiff, insured's brother, to whom the policy had been assigned in consideration of his having become surety on certain notes, and of insured's son to the proceeds of the policy, evidence showing that plaintiff who had for some years indorsed notes for insured, refused to indorse certain renewal notes, that insured thereupon suggested to his son, who managed his business affairs, and to plaintiff that certain life policies be assigned to him for security, that the son then stated the amount of assignable life policies held by insured, whereupon plaintiff, being satisfied with the general arrangement, signed part of the notes and the next day, after insured promised that the policies previously mentioned would be properly assigned, indorsed the remainder of the notes, and that the assignment, which was prepared by the son, included a policy in which he had an interest and which he knew could not be assigned, was sufficient to warrant the inference that plaintiff's indorsement was influenced by the son's conduct in respect to the policy, so that the son was estopped from asserting any interest in the proceeds thereof. *Pape v. Pape*, 153, 174 (6).
13. *Life Insurance Policy.—Construction.—Right to Proceeds.*—Where, in an application for a policy of life insurance, insured, in answer to the question, "If for the benefit of the wife, state precisely whether it shall be paid to her children, to his children, or the children of the two, if she be not living at its maturity," stated, "Their children," and the policy was made payable to insured's second wife, or if she was not living to "their children," insured's children by both marriages, on his being predeceased by the second wife, were entitled to a proportionate share in the proceeds of the policy. *Pape v. Pape*, 153, 164 (1).
14. *Life Insurance Policy.—Contingent Interests.*—Upon the delivery and acceptance of a life policy payable to insured's second wife for her sole use if living, or if not living to "their children," a son of insured by his first wife took an interest in the policy contingent upon his and insured's surviving the primary beneficiary, which would have terminated had the son predeceased the primary beneficiary, in which event his heirs would have had no interest in the insurance. *Pape v. Pape*, 153, 168 (2).
15. *Life Insurance Policy.—Right to Proceeds.—Heirs of Secondary Beneficiary.—Interests.*—Under a policy of life insurance payable to insured's second wife for her sole use if living or, if not, to their children, upon the death of the second wife, insured's children who survived the second wife, including a son by insured's first wife, took vested interests in the policy, and upon such son's subsequent death his heirs succeeded to his interest, and were entitled upon the death of the insured, to their distributive shares therein. *Pape v. Pape*, 153, 169 (4).

INTENTION—

As element of delivery, see **DEEDS 5**.
 Proof of, see **EVIDENCE 2**.
 Legislative, see **STATUTES 1**.

INTERPLEADER—

See also DEPOSITS IN COURT.

Rights of Interpleader.—Defenses.—Where a bank which issued a certificate of deposit paid into court the amount due thereon, but thereafter participated as an active adversary with the payee, opposing recovery of any amount by the plaintiff holder, it waived the right to claim the benefits of interpleader and may not object to the recovery of a judgment for principal and interest from the date of demand to the time of trial, which was more than the amount paid into court, since an essential element of interpleader is that the party claiming the benefits thereof asserts no claim to the money so paid, nor to any interest in the controversy. *Krieg v. Palmer Nat. Bank*, 677, 696 (12).

INTERROGATORIES

Answers, review, see APPEAL 58-61; BILLS AND NOTES 2; TRIAL 15.

INTERSTATE COMMERCE—

See COMMERCE.

INTERURBAN RAILROADS—

See RAILROADS.

JUDGMENT—

Review of, see APPEAL 1-6, 11-13, 26, 53; BASTARDS 1.

Void, collateral attack, see HIGHWAYS 5.

Conformance with statute, necessity, see BASTARDS 2, 3.

For judgments in particular actions or proceedings, see also the various specific topics.

1. *Default.—Setting Aside.*—Section 405 Burns 1914, §396 R. S. 1881, imposes an imperative duty on the court to relieve a party from a judgment against him, through his mistake, inadvertence, surprise or excusable neglect, where such facts are made to appear to the satisfaction of the court.

Daub v. Van Lundy, 468, 473 (2).

2. *Default.—Motion to Set Aside.—Requisite.—Showing of a Valid Defense.*—Under §405 Burns 1914, §396 R. S. 1881, providing that a party may be relieved from a judgment taken against him through mistake, inadvertence, surprise or excusable neglect and requiring a showing of a valid defense to the action, a verified motion to set aside the judgment based on the fact that the real estate involved in the mortgage foreclosure by default was conveyed to affiants by plaintiff's mortgagor as part of a fraudulent transaction, and that the realty involved never belonged to affiants, without any showing as to the nature of the fraud or the parties thereto, was properly overruled as not showing a valid defense to the foreclosure proceedings.

Daub v. Van Lundy, 468, 475 (6).

3. *Foreign Judgment.—Full Faith and Credit.*—As the Constitution requires that full faith and credit must be given to the public acts, records and judicial proceedings of every other state, where a court found that deceased was granted a divorce in Michigan, and there was nothing in the findings to overcome the presumption of regularity in the divorce proceedings, a conclusion of law that a woman whom deceased married subsequently to such divorce was his widow was not erroneous.

Hall v. Bauchert, 201, 206 (3).

JUDGMENT—Continued.

4. *Setting Aside.—Petition.—Sufficiency.—Statute.*—A petition to set aside a judgment which in effect is merely a motion to vacate the ruling on the motion for a new trial does not come within §405 Burns 1914, §396 R. S. 1881, providing that a party may be relieved of a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect.

Stampfer v. Peter Hand Brewing Co., 485, 492 (1).

JUDICIAL KNOWLEDGE—

See PLEADING 5.

JURISDICTION—

State and federal courts, conflict, see BANKRUPTCY 8, 9.

Appeal from justice of the peace, jurisdiction of circuit court, see JUSTICE OF THE PEACE.

Action for possession, see JUSTICES OF THE PEACE.

JURY—

Instructions, see TRIAL.

JUSTICES OF THE PEACE—

Appeals.—When Jurisdiction Is Conferred.—If a court of a justice of the peace does not have jurisdiction of the subject-matter of a cause commenced therein, a circuit court does not acquire jurisdiction on appeal. *Little v. Hoffman*, 371, 373 (2).

LABORERS—

See MASTER AND SERVANT.

LANDLORD AND TENANT—

See also APPEAL 7, 44.

Action for Possession.—Complaint.—Sufficiency.—Jurisdiction.—In a landlord's action for possession, a complaint describing the real estate as being in Indianapolis, Indiana, sufficiently showed that it was located in Marion county, so that a justice of the peace of such county had jurisdiction under §8071 Burns 1914, §5225 R. S. 1881, providing that in such actions only a justice of the peace of the county in which the lands are situated shall have jurisdiction. *Little v. Hoffman*, 371, 373, 374 (1).

LAW OF THE CASE—

See APPEAL 87, 94.

LEGISLATIVE POWER—

See INSURANCE 5.

LETTERS—

Sufficiency, to take transaction out of statute of frauds, see FRAUDS, STATUTE OF 2.

LIENS—

See CHATTEL MORTGAGES; MECHANICS' LIENS.

LIFE ESTATES—

Reservation, effect, see DEEDS.

LIFE INSURANCE—

See **INSURANCE**.

LIVE STOCK—

Killing, liability, see **RAILROADS** 14, 15.

MACHINERY—

Dangerous, guards, see **MASTER AND SERVANT** 2, 4-6.

MANDATORY INSTRUCTIONS—

See **TRIAL** 12.

MASTER AND SERVANT.

- I. **MASTER'S DUTY—NEGLIGENCE—** II. **WORKMEN'S COMPENSATION, 23-46.**
LIABILITY, 1-22.

See also **APPEAL** 59, 60; **COMMERCE**.

I. MASTER'S DUTY—NEGLIGENCE—LIABILITY.

1. **Assumption of Risk.—Contributory Negligence.—Jury Question.**
 —Where a servant, while acting in obedience to specific orders and directions of the master, was injured as a result of such obedience, it cannot be said, as a matter of law, that the injury was the result of an assumed risk, especially if the master gave the servant assurances of safety, though prior to receiving such assurances the servant had doubts and misgivings as to the danger; nor, under such circumstances, can it be said, as a matter of law, that the servant was guilty of contributory negligence.
Wolfe v. Griner, 698, 706, 707 (7).
2. **Injuries to Servant.—Guarding Dangerous Machinery.—Statute.**
 —Under §9 of the Factory Act, Acts 1899 p. 231, §8029 Burns 1914, where it is not practicable to guard a dangerous machine so fully and securely as to eliminate all danger, but it is practicable to guard it partially and thereby reduce the danger to the minimum, such partial guarding is in compliance with the statutory requirement.
Illinois Car, etc., Co. v. Brown, 315, 325 (5).
3. **Injuries to Servants.—Assumption of Risk.—Violating Statutory Duty.**—In a servant's action against the master for personal injuries, the doctrine of assumed risk has no application where the alleged negligence consists of the violation of a duty imposed by statute.
Illinois Car, etc., Co. v. Brown, 315, 323 (4).
4. **Injuries to Servant.—Action.—Complaint.—Sufficiency.**—In a servant's action against the master for injuries sustained by the breaking of an emery wheel, a complaint alleging that the wheel was unguarded, contrary to the laws of Indiana, that while unguarded it was dangerous to employes, and that the wheel could have been guarded at a small expense, so as to make it safe, and without interfering with the proper use thereof, is good as against a demurrer on the ground that an emery wheel is not such a machine as §9 of the Factory Act, Acts 1899 p. 231, §8029 Burns 1914, requires to be guarded.
Illinois Car, etc., Co. v. Brown, 315, 322 (3).
5. **Injuries to Servant.—Guarding Machinery.—Practicability.—Jury Question.**—Under §9 of the Factory Act, Acts 1899 p. 231, §8029 Burns 1914, requiring certain machinery to be properly guarded, whether a particular machine is dangerous, and whether it is practicable to guard it, are questions of fact for the jury.
Illinois Car, etc., Co. v. Brown, 315, 322 (2).

MASTER AND SERVANT—Continued.

6. *Injuries to Servant.—Negligence.—Unguarded Machinery.—Statute.*—Under §9 of the Factory Act, Acts 1899 p. 231, §8029 Burns 1914, requiring that all vats, pans, etc., be properly guarded, failure to guard the specified machinery is negligence *per se*, and all dangerous machines of every description must be properly guarded, if it is practicable to do so.
Illinois Car, etc., Co. v. Brown, 315, 322 (1).
7. *Injuries to Servant.—Negligence.*—In a servant's action for injuries caused by the breaking of an unguarded emery wheel, where the jury found that such wheel was dangerous, defendant was bound to take notice of its dangerous character and anticipate that injury would result from failure to properly guard it.
Illinois Car, etc., Co. v. Brown, 315, 323 (9).
8. *Injuries to Servant.—Negligence.—Proof.*—In a servant's action against the master for personal injuries sustained when an unguarded emery wheel broke, it was necessary to show, in order to sustain a finding that defendant was negligent, that the employer should have anticipated the exact injury, but it is sufficient if by ordinary care and prudence the employer should have known that some injury might result from the failure to guard the wheel. *Illinois Car, etc., Co. v. Brown*, 315, 323 (8).
9. *Injuries to Servant.—Negligence.—Instructions.*—In an action for wrongful death of a railroad employe due to being struck by a train, the giving of an instruction that where several acts of negligence are sufficiently alleged it is not essential that all of such negligent acts be proved, but there may be a recovery if it is proved that the injury was the result of some one or more of them, was not error, the acts charged being of such a nature that any one of them or any combination thereof might be found to be the negligence which constituted the proximate cause of the injury.
Pennsylvania Co. v. Stalker, Admr., 329, 343 (7).
10. *Injuries to Servant.—Assumption of Risk.—Procedure.—Federal Employers' Liability Act.*—In an action for personal injuries in a state court coming within the terms of the federal Employers' Liability Act of 1908, §8657 *et seq.* Comp. Stat. 1913, 35 Stat. at L. 65, the procedure is that prevailing in the state courts, and, though what amounts to assumption of risk is substantive law, the method of determining in any case whether an employe has assumed the risk is a question of procedure.
Pennsylvania Co. v. Stalker, Admr., 329, 337 (2).
11. *Injuries to Servant.—Action.—Conflicting Instructions.*—In an action for the wrongful death of a railroad employe who was struck by a train, an instruction that if decedent failed to obey any rule of defendant of which he had notice, or any instruction given him by his supervisor in defendant's service, and such failure contributed to bring about his injury, it might be considered as bearing upon the question of decedent's contributory negligence, but it would not be a defense to the action, is not erroneous and is not in conflict with an instruction to the effect that it was decedent's duty to exercise reasonable diligence to ascertain the rules promulgated by defendant, as it had the legal right to do, and that if decedent voluntarily failed or refused to conform or comply therewith, he assumed the risk, as the first instruction resting on the proposition that a mere failure to obey a rule amounts to contributory negligence, while the second

MASTER AND SERVANT—Continued.

instruction is based on the proposition that a voluntary violation of a rule amounts to assumption of risk.

Pennsylvania Co. v. Stalker, Admr., 329, 348 (8).

12. *Injuries to Servant.—Assumption of Risk.—Jury Question.*—Under the settled procedure of Indiana, it is a question of fact for the jury whether an employe assumed the risk of injury, in view of all the circumstances of the case.

Pennsylvania Co. v. Stalker, Admr., 329, 337 (3).

13. *Injuries to Servant.—Assumption of Risk.*—Being contractual in its origin and nature, assumption of risk will not arise by implication of law from a perilous situation suddenly created.

Pennsylvania Co. v. Stalker, Admr., 329, 339 (5).

14. *Injuries to Servant.—Assumption of Risk.—Evidence.*—In an action for the wrongful death of a railroad employe where decedent was struck and killed by a west-bound train running on the east-bound track contrary to custom, evidence held not to show that decedent assumed the risk.

Pennsylvania Co. v. Stalker, Admr., 329, 339 (6).

15. *Injuries to Servant.—Negligence.—Municipal Ordinance.—Police Regulation.*—In an action based on the federal Employers' Liability Act of 1908, §8657 *et seq.* Comp. Stat. 1918, 35 Stat. at L. 65, for the wrongful death of a railroad employe as a result of being struck by a train, a municipal ordinance prohibiting the running of trains within the corporate limits at a greater speed than ten miles an hour, and fixing a penalty for violations, was admissible as bearing on the question of negligence, since, though all state laws are superseded by the federal statute, the act does not specify what constitutes negligence, but leaves the question to be determined in accordance with the established rules of law.

Pennsylvania Co. v. Stalker, Admr., 329, 350 (10).

16. *Injury to Servant.—Mining.—Complaint.—Sufficiency.—Statutes.*—In an action by a coal miner for personal injuries sustained when the roof of a mine room caved in, allegations in a paragraph of complaint showing that the mine boss failed to furnish sufficient timbers to make the room safe and to inspect the same, as required by §8580 Burns 1914, Acts 1905 p. 65, and that such failure was the proximate cause of the injury, are not nullified by an allegation that there was no apparent danger and that the employe was unable to discover any defects in the roof by the use of the usual and ordinary tests.

Vandalia Coal Co. v. Shepard, 78, 82 (3).

17. *Safe Place to Work.—Scaffolds.—Liability.*—If the master elects to furnish a scaffold as a completed structure, he is responsible for a lack of reasonable care in its construction to a servant injured thereby, whether the choice is made in person or by one clothed with apparent authority; but where the master does not undertake to furnish the scaffold, but merely supplies suitable material therefor, the construction being entrusted to, or assumed by, the servants within the scope of their employment, the master is not liable for negligent construction to a servant injured thereby.

Wolfe v. Griner, 698, 702 (2).

18. *Safe Place to Work.—Scaffolds.*—Though the general rule at common law is that the master's duty to furnish the servant a safe place in which to work may not be delegated, an exception thereto applies in the construction of scaffolds, the rule being

MASTER AND SERVANT—Continued.

that, where a scaffold is required in the performance of the work, ordinarily the master owes the servant a duty in the alternative, either to furnish the scaffold or suitable materials for the construction thereof. *Wolfe v. Griner*, 698, 702 (1).

19. *Furnishing Scaffold.—Evidence.*—The act of the master's foreman in directing a servant to construct a scaffold is not decisive of the question whether the master elected to furnish a completed scaffold or suitable materials therefor, such act being consistent with either theory. *Wolfe v. Griner*, 698, 703 (3).

20. *Furnishing Scaffold.—Conflicting Evidence.—Jury Question.*—In a servant's action for injuries caused by a defective scaffold upon which he was working, whether the master elected to furnish suitable materials for the scaffold, leaving the construction thereof to the servants, or to furnish a completed scaffold under his direction or that of his representative, is a question for the jury where the evidence is conflicting or reasonably consistent with either theory. *Wolfe v. Griner*, 698, 704 (4).

21. *Scaffolds.—Construction.—Adoption by Master.*—In a servant's action for injuries caused by a defective scaffold, where there was some evidence that the plaintiff was not present when the scaffold was built and did not know the kinds of materials used, and that, upon inquiring before going upon the scaffold, he was assured by the defendant's foreman that it was "solid and good," the jury could have properly found that the master adopted it after its construction and furnished it to the plaintiff as a completed appliance, notwithstanding undisputed evidence showing that the master did not originally elect to furnish a completed scaffold. *Wolfe v. Griner*, 698, 705 (5).

22. *Scaffolds.—Adoption.—Liability.*—Where a master, after a scaffold is built under circumstances relieving him from liability, adopts it and furnishes it to the servant as a completed appliance, he becomes liable for injuries sustained by a servant by reason of negligent construction thereof.

Wolfe v. Griner, 698, 705 (6).

II. WORKMEN'S COMPENSATION.

23. *Compensation Agreement.—Jurisdiction of Industrial Board.*—An agreement between an employer and an injured employe for payment to the latter of a certain sum per week during total disability and the necessary surgical and medical expenses for the first thirty days, which agreement was incomplete and not in accordance with the statute, though it had been filed with, and approved by, the Industrial Board, was not so conclusive as to force the employe to bring action thereon in the circuit court to enforce his rights upon the employer's discontinuance of payments, since such agreement was not binding on the employe, nor did it terminate the jurisdiction of the board; and the board had power on application of the employe to grant an award which took into account the payments made under such agreement. *Standard Cabinet Mfg. Co. v. Huff*, 568.

24. *Autopsy.—Refusal.*—Where a claimant for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, told the employer's agent that she would not allow an autopsy unless it was absolutely necessary, but that she would talk with the employer, who failed to see her in reference to the matter, there

MASTER AND SERVANT—Continued.

was no unequivocal refusal to grant the employer the right to an autopsy as provided in §27 of the act.

Indianapolis Abattoir Co. v. Bryant, 225, 230 (4).

25. *Claimant's Refusal to Permit Autopsy.—Jurisdiction of Industrial Board.*—Although §27 of the Workmen's Compensation Act, Acts 1915 p. 392, provides that the employer, or the Industrial Board, shall have the right in any case to require an autopsy, the refusal of the next of kin to consent thereto does not deprive the board of jurisdiction to proceed to a final disposition of the case.

Indianapolis Abattoir Co. v. Bryant, 225, 228 (1).

26. *Waiver of Autopsy.—Jurisdiction of Industrial Board.*—Although claimant refused consent, the employer waived the right to an autopsy, as provided by §27 of the Workmen's Compensation Act, Acts 1915 p. 392, where it made no objection before the Industrial Board until after the trial and award, and it was then too late to question the board's jurisdiction of the subject-matter and of the parties.

Indianapolis Abattoir Co. v. Bryant, 225, 228 (2).

27. *Construction.—Right to Autopsy.*—Section 27 of the Workmen's Compensation Act, Acts 1915 p. 392, giving the employer the right to require an autopsy in case of accidental death of an employe, does not give the employer the right of an autopsy where the cause of death is clearly apparent without it, and the right should be exercised with caution.

Indianapolis Abattoir Co. v. Bryant, 225, 229 (3).

28. *Appeal.—Review.—Evidence.—Sufficiency.*—Where the inference that a servant's death resulted from an accident arising out of the employment was a conclusion reasonably deducible from the facts, such finding by the Industrial Board must be upheld, although other inferences might have been drawn from the evidence.

Polar Ice, etc., Co. v. Mulray, 270, 275 (3).

29. *Injuries.—Arising Out of Employment.—Assault by Fellow Servant.*—Where it was the duty of a servant to keep a record of the ice taken from the master's ice house by its drivers and to collect from them for shortage in their settlements, and the servant was shot and killed by a driver as a result of a quarrel over a collection, his death arose out of the employment. (*Union Sanitary Mfg. Co. v. Davis* [1916], 64 Ind. App. 227, distinguished.)

Polar Ice, etc., Co. v. Mulray, 270, 273 (2).

30. *Right to Compensation.—Injury Due to Felonious Act.*—A claim for compensation under the Workmen's Compensation Act, Acts 1915 p. 392, will not be denied merely because the accident resulting in the injury occurred by reason of the unlawful and felonious act of some third person, if the employe actually sustained it as a result of being specially and peculiarly exposed by the character and nature of his employment to the risk of the danger which befell him.

Polar Ice, etc., Co. v. Mulray, 270, 273 (1).

31. *Award of Compensation.—Evidence.—Sufficiency.*—In a proceeding for an award under the Workmen's Compensation Act, Acts 1915 p. 392, evidence showing that an employe's injury resulted in nephritis, which lowered his power to resist a disease to which he was predisposed and which caused his death earlier than it would otherwise have occurred, was sufficient to sustain an award to the employe's dependents.

Retmier v. Cruse, 192, 197. (4).

MASTER AND SERVANT—Continued.

32. *Finding of Facts.—Sufficiency.*—An award of the Industrial Board for an employee's death showing the fact of employment, that the employee died from a certain injury, and that prior to death the employer paid workmen's compensation for such injury, was sufficient, although not specifically stated that the injury occurred in the course of the employment.
Retmier v. Cruse, 192, 196 (3).
33. *Finding of Industrial Board.—Conclusion of Law.*—A finding by the Industrial Board that an employee received a personal injury by an accident arising out of and in the course of his employment is a legal conclusion and not a finding of an ultimate fact.
Retmier v. Cruse, 192, 194 (2).
34. *Appeal.—Assignment of Error.—Questions Presented.*—On an appeal from an award by the Industrial Board, an assignment of error that the award is contrary to law is sufficient to present both the sufficiency of the facts found to sustain the award and the sufficiency of the evidence to sustain the finding of facts.
Retmier v. Cruse, 192, 194 (1).
35. *Proceedings for Compensation.—Burden of Proof.*—Under the Workmen's Compensation Act, Acts 1915 p. 392, the burden is on the applicant for compensation for the death of her husband to prove by a preponderance of the evidence facts showing not only that she is a dependent of deceased, but also that he received an injury resulting in his death and that the injury arose out of and in the course of his employment.
Haskell, etc., Car Co. v. Brown, 178, 182 (2).
36. *Construction.—Accident.*—The word "accident" in the Workmen's Compensation Act, Acts 1915 p. 392, is used in its popular sense, and means any unlooked for mishap or untoward event not expected or designed.
Haskell, etc., Car Co. v. Brown, 178, 187 (7).
37. *Appeal.—Assignment of Error.—Sufficiency.*—On an appeal from an award of compensation by the Industrial Board, an assignment of error that the award is not sustained by sufficient evidence is proper, and it challenges the sufficiency of the evidence to sustain every issuable fact essential to the sustaining of the award.
Haskell, etc., Car Co. v. Brown, 178, 181 (1).
38. *Proceedings for Compensation.—Evidence.—Sufficiency.*—In a proceedings before the Industrial Board for compensation, the admission of hearsay evidence, even though error, would not entitle appellant to a reversal of an award for applicant, where the evidence aside from the hearsay testimony, was sufficient to sustain the award.
Haskell, etc., Car Co. v. Brown, 178, 190, 191 (11).
39. *Injuries in Course of Employment.*—In a proceedings under the Workmen's Compensation Act, Acts 1915 p. 392, for compensation for the death of a servant, where the undisputed evidence showed conclusively that decedent at the time of his injury was performing part of his duties at a time and place required by such duties, his accident occurred in the course of his employment.
Haskell, etc., Car Co. v. Brown, 178, 189 (10).
40. *Construction.—Accident in Course of Employment.*—The words "by accident growing out of and in the course of the employment," as used in workmen's compensation acts, should be given a broad

MASTER AND SERVANT—Continued.

and liberal construction in order that the humane purpose of such acts may be realized.

Haskell, etc., Car Co. v. Brown, 178, 188 (9).

41. *Accident.—Evidence.—Sufficiency.*—In a proceeding under the Workmen's Compensation Act, Acts 1915 p. 392, for compensation for the death of a servant, evidence showing, in substance, that decedent was employed in unloading heavy steel sheets, which work required a great deal of physical effort when it was necessary to separate sheets which at times became jammed together, that decedent became ill shortly after assisting in prying two of the sheets apart, and that the attending physician found deceased suffering from acute aneurism or bulging of the wall of a blood vessel, which is frequently caused by the strain incident to heavy lifting, is sufficient to sustain the conclusion of the Industrial Board that decedent's injury and consequent death was the result of an accident.

Haskell, etc., Car Co. v. Brown, 178, 187 (8).

42. *Appeal.—Sufficiency of Evidence.—Scope of Review.*—In determining whether the evidence is sufficient to sustain an award, the court on appeal can consider only that evidence most favorable to appellee.

Haskell, etc., Car Co. v. Brown, 178, 184 (6).

43. *Powers of Industrial Board.—Appeal.—Review.—Findings.—Inferences.*—The Industrial Board may, like a court or jury, draw reasonable inferences from the facts and circumstances in evidence, and where it does so, the court on appeal cannot say that the fact found as a result of such inferences is not supported by sufficient evidence, although such facts and circumstances are of a nature that reasonable men might draw opposite inferences.

Haskell, etc., Car Co. v. Brown, 178, 184 (5).

44. *Proceedings for Award.—Burden of Proof.*—Although the burden is on the applicant for workmen's compensation to prove each element essential to a recovery, this rule is met by any evidence, however slight, which is sufficient to make a reasonable man conclude in applicant's favor.

Haskell, etc., Car Co. v. Brown, 178, 183 (4).

45. *Appeal.—Evidence.—Sufficiency.*—An award of compensation will not be disturbed on appeal if there is evidence to support each element essential to a recovery.

Haskell, etc., Car Co. v. Brown, 178, 183 (3).

46. *Appeal.—Time for Perfecting.*—As the Industrial Board, under §60 of the Workmen's Compensation Act (Acts 1915 p. 392) has no authority to review an award by the full board, the time for perfecting an appeal begins to run from the date of the award so made, regardless of an attempted review thereof.

Kokomo Steel, etc., Co. v. Griswold, 45.

MECHANICS' LIENS—

1. *Notice.—Description.—Statute.—Construction.*—Where the only point in dispute between a materialman and the owner of property is relative to the description of the property contained in a mechanic's lien, the statute, §8297 Burns 1914, Acts 1909 p. 295, §3, is to be liberally construed.

Brannum-Keene Lumber Co. v. Cole, 667, 673 (3).

2. *Notice.—Description.—Extrinsic Evidence.*—Imperfect and inaccurate descriptions of property in a mechanic's lien notice may

MECHANICS' LIENS—Continued.

be aided by extrinsic evidence where proper averments appear in the complaint, and any description in such notice is sufficiently certain if the land described can be identified from it, or any reference therein, when aided by such evidence.

Brannum-Keene Lumber Co. v. Cole, 667, 672 (1).

3. *Notice.—Description.—Certainty.*—In an action to foreclose a mechanic's lien, where the rights of third parties were not involved, a complaint which set forth a notice of a mechanic's lien which showed the section, township, range, county, the acreage, the nature of the building erected thereon and the uses to which it was put, and which further alleged that the land on which the building was constructed was the only land owned by the defendant in that section and that such building was the only building thereon, was sufficient as against a demurrer for want of facts on the ground that the description contained in the notice was not sufficiently certain to permit introduction of extrinsic evidence, the allegations as to description being sufficient to raise a question of fact.

Brannum-Keene Lumber Co. v. Cole, 667, 673 (2).

MINERS—

Injuries, action, see **MASTER AND SERVANT** 16.

MISTAKE—

Relief from default judgment, see **JUDGMENT** 1.

MOOT QUESTION—

See **APPEAL** 3.

MORTGAGES—

See **CHATTEL MORTGAGES**.

MOTIONS—

See **NEW TRIAL**.

To modify judgment, ground of review, see **APPEAL** 11-13, 26.

MUNICIPAL CORPORATIONS—

See also **APPEAL** 79; **RECORDS**.

1. *Defective Sidewalk.—Injuries to Pedestrian.—Action.—Contributory Negligence.—Burden of Proof.*—In an action for injuries resulting from a fall on an icy sidewalk, the burden of proof on the issue of contributory negligence is upon the defendant, which burden is discharged where it appears from the whole evidence that plaintiff is guilty of negligence contributing to his injury.
Diffenderfer v. City of Jeffersonville, 10, 14 (2).

2. *Defective Sidewalk.—Injuries to Pedestrians.—Action.—Instructions.—Contributory Negligence.—Intoxication.*—In an action for personal injuries sustained in a fall on an icy sidewalk, where there was some evidence that plaintiff was at least partially intoxicated at the time he was injured, instructions informing the jury that intoxication might be taken into consideration as a circumstance in determining whether the person injured was negligent, and whether his negligence contributed to his injury, were not improper.

Diffenderfer v. City of Jeffersonville, 10, 17 (7).

MUNICIPAL CORPORATIONS—Continued.

3. *Defective Sidewalk.—Injuries to Pedestrian.—Contributory Negligence.*—Ordinarily a traveler is not required to forego the use of a street because of a known defect therein, but, if he thereafter attempts to travel the street, he is required to use that degree of care and caution which is commensurate with the knowledge; nor is a traveler necessarily guilty of negligence in attempting to pass over a public street or sidewalk which he knows to be dangerous, even though on account of darkness he cannot see so as to avoid the danger.

Diffenderfer v. City of Jeffersonville, 10, 14 (1).

4. *Defective Sidewalk.—Injuries to Pedestrian.—Action.—Contributory Negligence.*—In an action for personal injuries resulting from a fall on an icy sidewalk, where plaintiff, knowing the dangerous condition of the sidewalk, attempted to pass over it, and the danger was such that, under the circumstances, an ordinarily prudent person would not have attempted to use the walk, plaintiff was presumptively guilty of contributory negligence, but such presumption was rebuttable by evidence that he used care commensurate with the danger.

Diffenderfer v. City of Jeffersonville, 10, 14 (3).

5. *Defective Sidewalk.—Injuries to Pedestrian.—Action.—Instructions.*—In an action for injuries sustained in a fall on an icy sidewalk, an instruction that, if plaintiff had knowledge of the presence of ice on the sidewalk, he must be held to have known that there was danger of falling if he attempted to pass over it in the dark, and if he did attempt to so pass over it, and fell and was injured he could not recover, was not erroneous in view of evidence that plaintiff had lived near the scene of the accident more than four years and customarily used the walk in going to and from his work, that he knew there was ice on the walk, rendering it dangerous, and that, though unable to see on account of darkness, he used no care whatever for his safety.

Diffenderfer v. City of Jeffersonville, 10, 16 (6).

6. *Defective Sidewalk.—Injury to Pedestrian.—Contributory Negligence.—Evidence.*—In an action for personal injuries sustained in a fall on an icy sidewalk, where the evidence on the issue of contributory negligence showed that water from a leaky hydrant flowed across a city sidewalk, causing ice to form in freezing weather, so that it was dangerous to use the walk, that there was a grass plot on either side of the walk which was safe for travel, and that plaintiff, knowing such facts, attempted to pass over the sidewalk on a night so dark that he could not see the ice without exercising any care other than looking ahead, and in so doing fell and was injured, such evidence is sufficient to sustain a judgment for defendant.

Diffenderfer v. City of Jeffersonville, 10, 15 (4).

7. *Misappropriation of Public Funds.—Taxpayer's Action to Recover.—Pleading.*—In an action prosecuted by taxpayers of a municipality to recover misappropriated public funds, the complaint must affirmatively disclose their interest as that they are taxpayers.

City of Michigan City v. Marwick, 294, 301 (5).

8. *Misappropriation of Public Funds.—Taxpayer's Action to Recover.—Costs and Expenses.*—Where, by steps which they are authorized to take, taxpayers cause to be restored to the municipality funds wrongfully sequestered or misappropriated, they

MUNICIPAL CORPORATIONS—Continued.

may retain out of the fund or recover from the municipality their reasonable costs and expenses incurred, including the reasonable expense of procuring the services of expert accountants.

City of Michigan City v. Marwick, 294, 302 (6).

9. *Right of Taxpayers.—Public Funds.—Enjoining Misappropriation.*—Taxpayers of a municipality may enjoin municipalities and their officers from misappropriating public funds under their control, as such funds belong beneficially to the taxpayers.

City of Michigan City v. Marwick, 294, 301 (3).

10. *Right of Taxpayers.—Misappropriation of Public Funds.—Investigation and Recovery.*—Where public funds have been misappropriated, and the municipality and its proper officers on demand refuse to proceed to cause such funds to be restored, taxpayers, in the interest of themselves and all others similarly situated, may take steps to recover such funds in behalf of the municipality and to that end may conduct investigations and commence and prosecute appropriate actions.

City of Michigan City v. Marwick, 294, 301 (4).

NEGLIGENCE—

See also APPEAL 62, 79; CARRIERS; DEATH; MASTER AND SERVANT 1-22; MUNICIPAL CORPORATIONS; PLEADING 6; RAILROADS; STREET RAILROADS; WATERS AND WATERCOURSES.

Concurring Causes.—Liability.—Where an injury results from two concurring causes, a party at fault for one of such causes is liable if the injury would not have resulted in the absence of such fault.

Fort Wayne, etc., Traction Co. v. Parish, 597, 601 (3).

NEGOTIABLE INSTRUMENTS—

See BILLS AND NOTES.

NEW TRIAL—

See APPEAL 9, 17, 28, 32, 39, 45, 76; EXECUTORS AND ADMINISTRATORS 4.

NOTICE—

See MECHANICS' LIENS.

Revocation of agency, sufficiency, see PRINCIPAL AND AGENT 3.

NUISANCE—

Public.—Injunction.—Complaint.—Sufficiency.—In order for an individual to successfully maintain a suit to enjoin the creation or maintenance of a public nuisance, he must show that he sustains a particular or peculiar injury different in kind from that sustained by the public generally.

Eads v. Kumley, 361, 368 (7).

OBJECTIONS—

Grounds of review, see APPEAL 9, 30.

OBSTRUCTION—

Flood waters, liability, see WATERS AND WATERCOURSES 2, 6.

OPINIONS—

See EVIDENCE 2, 3.

ORDINANCES—

Violation, action, see **APPEAL** 62.

PARENT AND CHILD—

See also **ADOPTION**; **FRAUD**.

PAROL EVIDENCE—

See **EVIDENCE** 4.

PARTIES—

See **DEATH** 4; **HIGHWAYS** 4; **INSURANCE** 9; **SUBROGATION** 1, 2.

PARTITION—

See also **BANKRUPTCY**.

Action for.—Pleading.—Complaint.—Surplusage.—A plaintiff who has an absolute right to partition is entitled to sue without giving the reasons why, and all averments of the complaint which are explanatory of his desire for partition are, therefore, surplusage.
Harlin, Gdn., v. American Trust Co., Trustee, 213, 222 (5).

PARTNERSHIP—

See also **WITNESSES** 3.

1. *Action on Partnership Note.—Complaint.—Sufficiency.*—In an action on a partnership note, an amended paragraph of complaint averring that the named defendants doing a partnership business under a certain firm name executed the note, that the defendant who signed the firm name to the note by himself as manager was a member of the firm and its manager with authority to execute the note, and that he had a right to deliver the instrument to the payee, was sufficient as against a demurrer on the ground that the complaint did not allege facts to show the authority of such manager to sign the firm name for the members thereof.
Reed, Exrs., v. Farmers Bank, etc., 425, 429 (3).
2. *Action on Partnership Note.—Complaint.—Sufficiency.—Averment as to Partnership Assets.*—In an action against a partnership on a firm note, where the complaint stated a common cause of action against all the members of the firm, the fact that one of them died and that the executrix of his will was substituted as his defendant, since it did not affect plaintiff's cause of action, or make it a claim against the estate of the deceased member of the partnership, did not make essential to the sufficiency of the complaint averments showing that there were no partnership assets out of which plaintiff could make its claim that there was no solvent partner living.
Reed, Exrs., v. Farmers Bank, etc., 425, 430 (4).

PASSENGERS—

See **CARRIERS**.

PASSES—

Gratuitous, liability of carrier, see **CARRIERS** 5.

PAYMENT—

1. *Application.—Priority of Debts.*—Where a bridge contractor, after completion of the structure, paid to a materialman money not received on the bridge contract, without specific instructions as to its application, the court did not err in upholding the disposition thereof made by the materialman in applying it first to the payment of an older debt and crediting the balance on the bridge account. *Guthrie v. State, ex rel.*, 631, 635 (3).
2. *Application.—Rights of Parties.*—Where defendant entered into a written contract to deliver corn to plaintiffs, and executed his receipts for advancements, and, owing them no other debt at the time, commenced to deliver corn without attempting to collect pay therefor, it should be assumed that he intended that the value of such corn was to be applied to the receipts, and, when their amount in value of corn had been delivered, plaintiffs could not, in an action for money due on subsequent transactions in the account, recover attorney's fees as provided in the receipt. *Born v. Union Elevator Co.*, 97, 104 (4).
3. *Rights as to Application.—Intent of Parties.—Application of Payment by Court.*—Where a debtor owes distinct debts or accounts and he makes a voluntary payment, he may direct its application, but if neither party makes a specific appropriation of the payment, the law will apply it justly, and, in case of running accounts, in extinguishment of the first debt, unless a different intention on the part of the parties may be gathered from the facts and circumstances, and such rule is not confined to payments of money, but includes payments made in commodities. *Born v. Union Elevator Co.*, 97, 103 (3).

PEDESTRIANS—

Injuries, on defective sidewalks, liability, see **MUNICIPAL CORPORATIONS**.

Crossing accidents, care required, see **RAILROADS** 3.

PEREMPTORY INSTRUCTION—

See **TRIAL** 4.

Review, see **APPEAL** 88.

PERSONAL INJURIES—

See **CARRIERS**; **NEGLIGENCE**; **MUNICIPAL CORPORATIONS**; **RAILROADS**; **STREET RAILROADS**.

PERSONAL PROPERTY—

Decree affecting, in divorce action, see **DIVORCE** 3-5.

Payment of debts of estate, see **EXECUTORS AND ADMINISTRATORS**.

PLEADING—

Review of rulings on, see **APPEAL** 8, 23, 25, 47, 48, 72, 73, 92.

For pleadings in particular actions or proceedings, see also the specific topics.

1. *Complaint.—Conclusions.—Construction.—Statute.*—A complaint which at least contains an adequate statement of conclusions is sufficient in the absence of a motion to require a statement of facts, under §343a Burns 1914, Acts 1913 p. 150, as to the construction of allegations in pleadings.

Fisher v. Carey, 438, 444 (4).

PLEADING—Continued.

2. *Complaint.—Theory.*—A complaint should proceed upon some certain and definite theory which must be determined by its general scope and tenor. *Fisher v. Carey*, 438, 444 (5).
3. *Pleading Conclusions.—Sufficiency.—Statute.*—Under §343a Burns 1914, Acts 1913 p. 850, as to the construction of pleadings, the pleader's conclusions must be construed, in determining the sufficiency of a pleading, as equivalent to the averment of all the facts required to sustain such conclusions.
Haines v. Trueblood, 456, 462 (2).
4. *General Denial.—Evidence Admissible.*—Facts pleaded in paragraphs of answer which are not by way of confession and avoidance, but directly controvert or rebut matters pleaded by the complaint, are admissible in evidence under the general denial.
City of Michigan City v. Marwick, 294, 299 (1).
5. *Matters of Judicial Knowledge.—Statute.*—Under §383 Burns 1914, §374 R. S. 1881, providing that matters of which courts take judicial notice need not be pleaded, where a complaint to recover possession of real estate showed that the property involved was located in Indianapolis, it was unnecessary to allege that it was in Marion county, Indiana, since the courts will take judicial notice that the city of Indianapolis is located in that county.
Little v. Hoffman, 371, 374 (5).
6. *Negligence.—Allegations.—Sufficiency.*—Where the acts charged are of such a nature and character as to be necessarily negligent, they will be so regarded, although not in terms characterized as negligent.
Evansville, etc., R. Co. v. Scott, 121, 130 (1).

PLEDGES—

Incomplete Promissory Note.—Use as Collateral Security.—Effect.—In executing a promissory note, which was to be used as collateral security and which was incomplete by reason of the absence of the date of execution and the name of the payee, the maker authorized its use as collateral security for a loan of any amount obtainable for any period of time within the three years the note was to run before its maturity.
Hubbard v. First State Bank, etc., 47, 64 (7).

POLICE POWER—

See **TAXATION** 3.

POSSESSION—

Action, complaint, sufficiency, see **LANDLORD AND TENANT**.

PRESUMPTIONS—

On appeal, see **APPEAL** 55-58.

PRIMA FACIE CASE—

See **BRIDGES** 2.

PRINCIPAL AND AGENT—

1. *Authority of Agent.—Proof.—Declarations.*—The authority of an agent cannot be proved by his declarations alone.
W. T. Rawleigh Medical Co. v. Van Winkle, 24, 30 (3).

PRINCIPAL AND AGENT—Continued.**2. Continuance of Agency.—Presumption.—Liability of Principal.**

—A general agency once established is presumed in law to continue, and one dealing with such person as the agent of his principal, in good faith, is not affected by the revocation of the agent's authority, unless notice is given thereof.

Georgia Life Ins. Co. v. Otter Creek Coal Co., 277, 280 (1).

3. Revocation of Agency.—Necessity of Notice.—Notice of the revocation of an agency need not be in any particular form and need not be communicated in any particular manner, but to be effective it must be clear and unequivocal.

Georgia Life Ins. Co. v. Otter Creek Coal Co., 277, 281 (3).

PRINCIPAL AND AGENT—

See also **BROKERS; INSURANCE 1.**

PRINCIPAL AND SURETY—

See also **ALTERATION OF INSTRUMENTS 2.**

1. Accommodation Note.—Discharge of Surety.—Where the continued use of a note as collateral security without an indorsement was fully within the intention of the parties and the plan originally adopted for raising the money to which a maker lent his name for the accommodation of a technical institute, the acceptance of the renewal note without the indorsement of the president of the institution did not in any way violate the maker's contract so as to discharge him from liability.

Hubbard v. First State Bank, etc., 47, 64, 65 (8).

2. Departure from Contract.—Discharge of Surety.—A surety is relieved from his contract by dealings or arrangements between his principal and the creditor, to which he is not a party, and which constitute a departure from the contract which may possibly vary or enlarge his liability without his consent.

Hubbard v. First State Bank, etc., 47, 65 (9).

PRIORITIES—

See **PAYMENT 1.**

Guardianship funds, commingling, effect as to general creditors, see **BANKS AND BANKING.**

PROMISSORY NOTES—

See **BILLS AND NOTES.**

PROXIMATE CAUSE—

See **WATERS AND WATERCOURSES 2.**

PUBLIC FUNDS—

Misappropriation, taxpayer's action, see **MUNICIPAL CORPORATIONS 7-10.**

PUBLIC NUISANCE—

See **NUISANCE.**

QUIETING TITLE—

Action Predicated on Deed.—Evidence.—In an action to quiet title in decedent's daughter, who claimed ownership under a deed from her father, receipts from other children of decedent wherein

QUIETING TITLE—Continued.

they acknowledged that they had received and accepted certain property from their father in full of their share of the real estate then owned, or which might thereafter be acquired, was properly excluded, as being immaterial.

Smithson v. Bouse, 66, 76 (5).

RAILROADS—

See also CARRIERS; DEATH; EMINENT DOMAIN; STREET RAILROADS.

1. *Construction over Streams.—Duty of Railroad.*—Under §5196, cl. 5, Burns 1914, §3903 R. S. 1881, railroad companies have a right to build their roads upon or across a watercourse, but they must refrain from interfering with its free use, so that security to property is afforded, and in this behalf they must restore the stream to substantially its former state so as not to impair its usefulness more than is absolutely necessary.
Evansville, etc., R. Co. v. Scott, 121, 151 (18).
2. *Crossing Accidents.—Trial.—Instructions.—Care Required.*—In an action against a railroad company for personal injuries sustained in a collision between its train and a street car in which plaintiff was riding, error, if any, in instructing the jury that the street car company owed plaintiff, as a passenger, only ordinary care and diligence in operating its car over the crossing, was harmless, since the railroad company had the right to rely only on the street car company's duty toward it, which was that of using only ordinary care to avoid the collision, and it could not rely on the street car company discharging a higher degree of care toward its passengers.
Evansville, etc., R. Co. v. Hoffman, 571, 575, 577 (4).
3. *Crossing Accidents.—Duty to Street Car Passengers.*—A railroad company owes a street railroad company crossing its tracks the same duty as it owes pedestrians and the drivers of private vehicles, which is ordinary care and diligence not to inflict injury on them in the operation of its engines and cars.
Evansville, etc., R. Co. v. Hoffman, 571, 576 (5).
4. *Crossing Accidents.—Duty to Use Air Brakes.—Question for Jury.*—Although there was no statute requiring air brake equipment and the use thereof, yet, where railroad cars were in fact so equipped, whether it was the railroad company's duty to use the air brakes to avoid a crossing collision with a street car depended on whether such use was reasonably necessary in the discharge of its duty to use ordinary care and diligence, and such question was one of fact for the jury in a street car passenger's action against the railroad for injuries sustained in the collision. *Evansville, etc., R. Co. v. Hoffman*, 571, 578 (8).
5. *Injuries on Tracks.—Anticipating Negligence.—Presumption as to Speed.*—One rightfully on the station premises of a railroad has a right to assume, in the absence of knowledge or warning to the contrary, that trains will not be operated at an excessive speed, and without due signals, or in any other negligent manner.
Smith, Adm., v. Cleveland, etc., R. Co., 397, 419 (31).
6. *Injuries on Tracks.—Contributory Negligence.—Care Required.*—Due care for his own safety required a person on the station premises of a railroad to use reasonable diligence and caution to protect himself from all dangers arising from the operation of passing trains in a prudent and proper manner, and in such

RAILROADS—Continued.

other manner as may have been, or could have been, known to him by the exercise of ordinary care under the circumstances, but he was not required to use such unusual and extraordinary care as would be necessary for his protection from dangers arising from the reckless or negligent operation of passing trains of which he had no knowledge, either actual or constructive, in time to escape.

Smith, Adm., v. Cleveland, etc., R. Co., 397, 418 (30).

7. *Injuries on Tracks.—Trespasser.*—Where one went to a railroad station to ship a case of eggs, and, after doing so, decided to wait for a milk can he was expecting on another train, he was not a trespasser, but was rightfully on the railroad's premises, bound to exercise reasonable care for his own safety commensurate with the dangers of which he had either actual or constructive knowledge.

Smith, Adm., v. Cleveland, etc., R. Co., 397, 418 (28).

8. *Injuries on Tracks.—Negligence.—Jury Question.*—In an action against a railroad for the death of one using its tracks at a station, the complaint being grounded on defendant's alleged negligence in running its train past another train discharging passengers at a station in violation of its rules and without using due care, where the evidence was conflicting as to the speed of the train, when the steam was shut off and whether warning signals were given, the question of defendant's negligence under the circumstances was for the jury, so that the court was not warranted in directing a verdict for defendant.

Smith, Adm., v. Cleveland, etc., R. Co., 397, 418 (25).

9. *Injuries on Tracks.—Trains Passing at Station.*—A railroad company is under a common-law duty to use caution in passing with one train another train receiving and discharging passengers at a station.

Smith, Adm., v. Cleveland, etc., R. Co., 397, 415 (20).

10. *Injuries on Tracks.—Reasonable Care.—What Constitutes.*—What constitutes reasonable care on the part of railroad employes operating a train for the protection of persons lawfully using the tracks at a station depends upon circumstances, and may require constant outlook after the place of possible danger is visible, the giving of warning signals, reduction of speed, or even stopping the train.

Smith, Adm., v. Cleveland, etc., R. Co., 397, 416 (23).

11. *Injuries on Tracks.—Care Required.*—Where the tracks of a railroad curved sharply to the east and west of a station, and passed through deep cuts and between high hills, so as to obstruct the view of approaching trains, it was the duty of the road's servants operating a train to use reasonable care to ascertain if a train was at the station discharging passengers and, if so, to have stopped, as required by a rule of the railroad, and not attempted to pass between the standing train and the station platform, and to have used such reasonable care as might be necessary for the protection of any person lawfully using the tracks at that point.

Smith, Adm., v. Cleveland, etc., R. Co., 397, 416 (22).

12. *Injuries on Tracks.—Trains Passing Station.—Negligence.—Violation of Rule.*—The violation by a railroad of its rule to the effect that "trains must use caution in passing a train receiving

RAILROADS—Continued.

and discharging passengers at a station, and must not pass between it and the platform at which the passengers are being received or discharged," was not negligence *per se*, but was proper, in an action for wrongful death, as an item of evidence tending to show the degree of care recognized by the road as ordinary care under the conditions specified in the rule.

Smith, Adm., v. Cleveland, etc., R. Co., 397, 415 (21).

13. *Injuries on Tracks.—Contributory Negligence.—Conflicting Evidence.—Jury Question.*—Where one was killed on a railroad's station premises by one train passing another train which was receiving and discharging passengers, and the evidence, in an action for the death, was conflicting as to the care used in operating the train striking decedent, both as to its speed and where and when warning signals, if any, were given, and the jury might have found, on weighing the evidence, that decedent was rightfully on the track, and used reasonable care for his own safety as against all known danger, or danger which he might reasonably have anticipated or known by the exercise of due care, but notwithstanding such care he was killed because of the negligent manner in which the train was operated under the existing circumstances, the question of decedent's contributory negligence was for the jury.

Smith, Adm., v. Cleveland, etc., R. Co., 397, 419 (32).

14. *Interurban Railroads.—Killing Stock.—Entry Through Gate.—Liability.*—Under §5712 Burns 1914, Acts 1903 p. 426, requiring an abutting landowner, when an interurban railroad is fenced at a point where a private way is constructed across it, to erect and maintain a gate across the way and to keep it fastened and closed when not in use by him, where an abutting owner's cattle pushed a gate in the fence open, came on the private crossing and then passed over the cattle guard, which the railroad company had contracted to maintain, onto its tracks, and were killed by its car, the railroad was not liable, unless guilty of negligence.

Terre Haute, etc., Traction Co. v. Combs, 116, 119 (2).

15. *Interurban Railroads.—Killing Stock.—Action.—Complaint.—Sufficiency.*—In an action against a railroad company to recover for live stock killed on its right of way, a complaint showing a contract between plaintiff and defendant railroad under which the latter, in consideration of a grant of a right of way, agreed to construct and maintain two crossings and cattle guards at such points as plaintiff should designate, that defendant constructed them but neglected and refused to keep the cattle guards in repair, so that they would turn stock and prevent it from getting on the right of way, and that, without fault on the part of plaintiff, his cows, in going over one of the crossings, strayed over and across the cattle guard and were killed, states a cause of action. *Terre Haute, etc., Traction Co. v. Combs*, 116, 118 (1).

REAL ESTATE—

Sales, excess acreage, recovery, see **VENDOR AND PURCHASER.**

RECORDS—

Preparation and contents for appeal, see **APPEAL 20-22.**

Records of Municipal Corporation.—Right to Examine.—Taxpayers of a municipality have a right to examine its books and records at proper times for any legitimate purpose.

City of Michigan City v. Marwick, 294, 300 (2).

REMONSTRANCE—

See DRAINS 1-3, 5; INJUNCTION 3.

RES GESTAE—

See EVIDENCE 5.

RESIDENCE—

Affidavit in divorce proceedings, sufficiency, see DIVORCE 1, 2.

RETALIATORY STATUTE—

See INSURANCE 3, 6; STATUTES 3.

REVIEW—

See APPEAL.

RISKS—

Assumption, see MASTER AND SERVANT 1, 3, 10, 12-15.

Assumption, under Employer's Liability Act, see COMMERCE.

RIVERS—

See WATERS AND WATERCOURSES.

RULES OF COURT—

Preparation of briefs, see APPEAL 28-38, 40, 41.

SALES—

See also VENDOR AND PURCHASER.

1. *Contract.—Construction.*—A provision of a contract for the sale of goods, payment of which was secured by written guaranty, that the seller did not obligate itself to honor the buyer's orders for goods, if his account was at any time in an unsatisfactory condition, was for the benefit of the seller, and not the buyer or his guarantors.

W. T. Rawleigh Medical Co. v. Van Winkle, 24, 31 (4).

2. *Sale of Goods.—Contract.—Construction.*—Where a seller of drugs and medicines was obligated by the contract of sale to instruct and advise the buyer, who purchased for resale, as to the best methods of selling the goods, and in pursuance to such agreement mailed to the buyer booklets and letters suggesting that he leave samples with prospective purchasers, to be finally purchased and paid for only in event that they proved satisfactory, the buyer could not escape liability for samples so delivered and not paid for, in the absence of anything in either the booklets or the letters, or in the contract, indicating that the buyer should be excused from payment for such articles.

W. T. Rawleigh Medical Co. v. Van Winkle, 24, 27 (1).

3. *Sale of Goods.—Right to Return.*—Where defendant, who purchased drugs and medicines from plaintiff under a contract not authorizing their return, sent back a quantity of unsold goods at the direction of one representing himself to be plaintiff's traveling auditor, but did not list them on certain inventory blanks as required by plaintiff's custom in such cases, and plaintiff informed defendant that it refused to receive the goods back for that reason and that it would not do so unless they were properly inventoried on blanks furnished for that purpose and

SALES—Continued.

the freight paid, defendant, having failed to comply with the conditions imposed by plaintiff, cannot avoid liability for the articles so returned on plaintiff's refusal to accept the same.

W. T. Rawleigh Medical Co. v. Van Winkle, 24, 29, 31 (2).

SCAFFOLDS—

Construction, liability for injuries, see **MASTER AND SERVANT** 17-22.

SERVANTS—

See **MASTER AND SERVANT**.

SPECIAL FINDINGS—

See **TRIAL** 19-28.

Review of, see **APPEAL** 49, 67.

SPOILIATION—

See **ALTERATION OF INSTRUMENTS**.

STATUTES—

Cited and construed, see p. xxiii.

Retaliatory, enforcement, see **INSURANCE** 3.

1. *Construction.—Legislative Intent.*—On construing a statute the court is required to discover, if possible, the legislative intention in the enactment of the particular statute under consideration.

State, ex rel. v. Continental Ins. Co., 536, 548 (2).

2. *Construction.—Imposition of Special Tax.*—Statutes imposing a special tax on corporations are within the rule that a statute providing for the imposition of taxes shall be strictly construed and that all reasonable doubts in respect thereto shall be resolved against the government and in favor of the citizen.

State, ex rel. v. Continental Ins. Co., 536, 556 (6).

3. *Retaliatory Statute.—Construction.—Enforcement.*—Section 4806 Burns 1914, §3773 R. S. 1881, being penal in its nature and involving the comity of states, must be strictly construed and executed with care.

State ex rel. v. Continental Ins. Co., 536, 562 (9).

STREAMS—

See **WATERS AND WATERCOURSES**.

STREET RAILROADS—

See also **CARRIERS; RAILROADS**.

1. *Operation.—Ordinary Care.*—Ordinary care required the motorman of a street car to keep a lookout ahead.

Beck v. Indianapolis Traction, etc., Co., 635, 645 (2).

2. *Collisions.—Contributory Negligence.*—Where the driver of a hearse started to drive diagonally across street car tracks, when a car 150 feet away was approaching at the rate of six to ten mile an hour, the mere fact that he saw the motorman looking in an opposite direction would not be sufficient to charge him with contributory negligence as a matter of law.

Beck v. Indianapolis Traction, etc., Co., 635, 645 (3).

3. *Collisions.—Instructions.—Province of Jury.*—Where the driver

STREET RAILROADS—Continued.

of a hearse attempted to drive diagonally across street car tracks and was struck by a street car, in an action for the damages occasioned thereby, an instruction that, if the driver of the hearse drove on the tracks when he might have stopped after observing that the motorman was not looking, there could be no recovery, was improper as an invasion of the province of the jury, since the jury had the right to determine whether the driver acted as a reasonably prudent person would have acted under the same circumstances.

Beck v. Indianapolis Traction, etc., Co., 635, 643 (1).

4. *Collisions.—Contributory Negligence.—Custom.*—In an action for damages sustained by the plaintiff in a collision between a hearse and a street car, where the defendant admitted a custom to give funeral processions the right of way, an instruction that, though the plaintiff, the driver of the hearse, had an equal right with the defendant to drive on that part of the street occupied by the tracks, it was his duty on seeing the car to drive off the tracks, was improper as ignoring the admitted custom.

Beck v. Indianapolis Traction, etc., Co., 635, 645, 646 (4).

STREETS—

See MUNICIPAL CORPORATIONS.

SUBROGATION—

1. *Actions.—Parties.*—Ordinarily the remedy by subrogation cannot be applied unless those whose rights will thereby be affected are parties to the proceeding.

City of Michigan City v. Marwick, 294, 306 (10).

2. *Actions.—Parties.*—In an action by expert accountants against a city for subrogation of the rights of a committee of citizens and taxpayers who had employed them to examine the city's books, the citizens' committee were necessary parties in view of the fact that the amount of compensation to be paid plaintiffs was in dispute.

City of Michigan City v. Marwick, 294, 314 (11).

3. *Defenses.—Adequate Remedy at Law.*—The remedy of subrogation being equitable in nature, the established maxims of equity are applicable, and ordinarily one may not resort to subrogation where he has a clear and adequate remedy at law.

City of Michigan City v. Marwick, 294, 306 (9).

4. *Right to Subrogation.—Actions.—Complaint.—Sufficiency.*—In an action against a city by expert accountants to recover for certain services, where the complaint alleged that certain citizens and taxpayers of a city apprised the city officials of facts sufficiently definite to require that the city's financial affairs be investigated, and that they requested such officials to cause an investigation to be made, which request was denied, whereupon such citizens and taxpayers engaged plaintiffs, who, on auditing the city's books, discovered a shortage, which was subsequently made good, but not averring that such citizens or taxpayers were insolvent, nor disclosing any other reason why they could not be required to perform their obligations to pay plaintiffs for their services, so that it was necessary for plaintiffs to resort to subrogation or any equitable principle to recover what was due them, such complaint is insufficient to state a cause of action against the city on the theory of subrogation of the claim the taxpayers held against the municipality, since the facts alleged

SUBROGATION—Continued.

show only that such citizens and taxpayers were indebted to plaintiffs, and that, having discharged their indebtedness, they might recover from the city the reasonable value of plaintiff's services. *City of Michigan City v. Marwick*, 294, 303, 306, 312 (7).

5. *Theory.—Applicability.*—Subrogation is defined as the equity by which a person who is secondarily liable for a debt, and who has paid it, is put in the place of the creditor, and it is applied where a man pays a debt which could not properly be called his own, but which it was his interest to pay.

City of Michigan City v. Marwick, 294, 305 (8).

SUBSCRIPTIONS—

Stock, effect of collateral agreement, see CORPORATIONS 4.

SUBSEQUENT APPEALS—

See APPEAL 94.

SUDDEN PERIL—

Degree of care, see CARRIERS 4.

SUMMONS—

Voluntary appearance of executor or administrator, effect, see ABATEMENT AND REVIVAL.

SURETIES—

See PRINCIPAL AND SURETY.

SURFACE WATERS—

See WATERS AND WATERCOURSES 4, 7, 8.

SURPLUSAGE—

See PARTITION.

SURPRISE—

Sufficiency of showing to set aside default, see APPEAL 70.

TAXATION—

Foreign insurance companies, see also INSURANCE 6.

1. *Foreign Insurance Companies.—Reinsurance.—Statute.*—Under §10216 Burns 1914, Acts 1891 p. 199, §67, imposing a tax on the gross premium receipts of foreign insurance companies doing business in this state, a foreign fire insurance company is not required to pay taxes on reinsurance premiums received from other companies on account of risks located in Indiana where the business is transacted in another state.

State, ex rel. v. Continental Ins. Co., 536, 557 (7).

2. *Receipts of Foreign Insurance Companies.—Statute.—Construction.*—Under §10216 Burns 1914, Acts 1891 p. 199, §67, requiring insurance companies not organized under the laws of Indiana and doing business therein to report for taxation semi-annually the gross amount of all receipts received in the state on account of insurance premiums for the six months last preceding, less losses actually paid within the state, an insurance company had the right in determining the amount of premium income subject

TAXATION—Continued.

to taxation to deduct from its book entries of gross premiums the amount of premiums represented by "flat" cancellations of policies for which no premiums had been received, since the statute required it to pay taxes only on premiums received and retained. *State, ex rel. v. Continental Ins. Co.*, 536, 548, 556 (1).

3. *Taxation and Regulation of Foreign Insurance Companies.—Police Power.—Statute.—Construction.*—Section 4790 *et seq.* Burns 1914, §3765 R. S. 1881, regulating the business of foreign companies in this state and §10216 Burns 1914, Acts 1891 p. 190, §67, imposing a tax upon the gross premium receipts of such companies, emanate from the police power of the state, and, being interrelated, should be construed together.

State, ex rel. v. Continental Ins. Co., 536, 549 (4).

TAXPAYERS—

Public records, examination, see RECORDS.

Actions, misappropriation of funds, see MUNICIPAL CORPORATIONS 7-10.

TELEGRAPHS AND TELEPHONES—

Enjoining Use of Telephone Line.—Damages.—Evidence.—Value of Use of Line.—In an action to enjoin defendant from using plaintiff's telephone line, and to recover damages for trespass, it was not error for the trial court to permit one of the plaintiffs to testify what the uninterrupted use of the telephone line would be worth per month. *Fisher v. Carey*, 438, 445 (7).

TESTAMENTS—

See WILLS.

TEXT-BOOKS—

Cited, see p. xxvi.

THEORY—

See PLEADING 2.

On appeal, see APPEAL 47, 54.

TIMBER—

Enjoining removal, sufficiency of evidence to show title, see ADVERSE POSSESSION.

TOWNS—

See MUNICIPAL CORPORATIONS.

TRACKS—

See RAILROADS.

TRANSCRIPT—

Time for filing, see APPEAL 15.

TRESPASS—

Admission of evidence, harmless error, see APPEAL 76.

Enjoining, complaint, see INJUNCTION 1.

TRESPASSER—

See RAILROADS 7.

TRIAL.

- | | |
|--|----------------------------|
| I. TAKING CASE OR QUESTION FROM JURY, 1-4. | III. VERDICT, 16. |
| II. INSTRUCTIONS TO JURY, 5-15. | IV. TRIAL BY COURT, 17-29. |

Direction of verdict, power of court, see DEEDS 4.

Admission and exclusion of evidence, review, see APPEAL 76-78.

I. TAKING CASE OR QUESTION FROM JURY.

1. *Directing Verdict.—Power of Trial Court.—Weighing Evidence.*—The trial court cannot weigh the evidence to determine the facts involved in order to direct a verdict.
Smith, Adms., v. Cleveland, etc., R. Co., 397, 416 (24).
2. *Directing Verdict.*—In a servant's action for injuries caused by a defective scaffold upon which he was working, it was error to direct a verdict for the defendant where there was some evidence from which inferences might have been drawn in the plaintiff's favor on each essential averment of the complaint and also on the issues of assumption of risk and contributory negligence relied on by the defendant. *Wolfe v. Griner, 698, 707 (8).*
3. *Jury Questions.*—Where reasonable minds may differ upon the conclusions and inferences to be drawn from the evidence, the question is one of fact for the court or jury trying the same.
Evansville, etc., R. Co. v. Hoffman, 571, 583 (15).
4. *Peremptory Instruction.—Consideration of Evidence.*—A trial court is authorized to direct a verdict in favor of a defendant only where there is an entire lack of evidence on some essential phase of the case necessary to a recovery, and, when a motion is made for such a verdict, it is for the court to say whether there is any evidence to support each material issue or fact, and if there is such evidence, its weight or probative value is for the jury, and, in event the evidence is conflicting, so much thereof as is favorable to the party making the motion is deemed withdrawn, for the purpose of deciding the question presented by the motion, and the court will consider only the evidence, if any, favorable to the opposite party.
Smith, Adms., v. Cleveland, etc., R. Co., 397, 409 (9).

II. INSTRUCTIONS TO JURY.

5. *Instructions.—Cure of Error.*—Instructions are not erroneous because they do not apply to all the separate issues involved, where such issues were covered by other instructions.
Evansville, etc., R. Co. v. Hoffman, 571, 575 (2).
6. *Instructions.—Issues.*—In an action for the death of a pedestrian, where the complaint showed that decedent was struck by an automobile while lawfully upon the street and exercising due care for his own safety, an instruction that he had a right to cross the street was not erroneous or harmful, although there was no controversy over the matter.
Indianapolis Traction, etc., Co. v. Lee, Hara., 105, 110 (1).
7. *Instructions.—Duty to Request.—Waiver of Error.*—If defendants in an action for wrongful death desired a more complete instruction on the measure of damages than that given, it was

TRIAL—Continued.

their duty to tender a correct and appropriate instruction on that subject, and, having failed to do so, they cannot complain.

Indianapolis Traction, etc., Co. v. Lee, Earz., 105, 114 (6).

8. *Instructions.—Conflict.*—In an action against a railroad company for personal injuries sustained in a collision between its train and a street car in which plaintiff was riding, an instruction that defendant owed no duty to equip its cars with air brakes, and have them connected and in use merely to avoid injury to street cars or other vehicles which might be imperiled at crossings through the negligence of persons in charge of them was correct and not in conflict with an instruction that failure of defendant's servants to use air brakes with which the cars were equipped to avoid the collision would be considered on the issue of defendant's negligence. *Evansville, etc., R. Co. v. Hoffman, 571, 580 (9).*
9. *Instructions.—Cure of Error.*—In an action for personal injuries, instructions hypothesizing the finding of negligence, proximate cause, and consequent injury and damages were not erroneous for failing to hypothesize plaintiff's freedom from contributory negligence, where such instructions dealt only with the complaint and plaintiff's right to recover on proof of certain averments and by other instructions the court informed the jury that plaintiff could not recover unless he was free from contributory negligence.
Evansville, etc., R. Co. v. Hoffman, 571, 574 (1).
10. *Instructions.—Consideration of Evidence.*—An instruction that certain questions of fact must be determined from "all the evidence in the case" was not erroneous because of the use of the words quoted, where, when considered in their relation to the preceding portions of such instruction, it was apparent that the jury could not have understood that they were to consider any evidence, in determining the questions to which the instruction was addressed, except such as properly bore thereon.
Evansville, etc., R. Co. v. Hoffman, 571, 577 (6).
11. *Instructions.—Consideration of Evidence.*—In an action for damages for assault and rape, an instruction calling attention to matters collateral to the main issue upon which evidence had been offered, and stating that such evidence would be considered only in determining whether defendant committed the alleged assault and rape, was favorable to defendant, and was not objectionable as singling out certain phases of the evidence.
Miller v. Rayburn, 564, 567 (3).
12. *Instructions.—Mandatory Instructions.*—In an action against a street railroad company and the owner of an automobile truck for the death of a pedestrian, the negligence charged against defendant company being that in violation of a city ordinance it permitted the street pavement to become so worn that there were a number of holes in the same, an instruction that if the jury found that there was a hole in the street large enough for a wheel of a truck to have dropped into, "all as alleged in the complaint," and that the driver saw the hole, or could have seen it by the exercise of ordinary care, and negligently drove the machine so that a wheel dropped into it, causing the truck to veer and strike deceased, the finding should be for plaintiff, although mandatory in form and failing to specifically set out each element essential to plaintiff's recovery, such instruction was not harmful to defendants in view of the qualifying phrase, "all

TRIAL—Continued.

as alleged in the complaint," which averred facts constituting actionable negligence, and other instructions supplying the omitted essentials.

Indianapolis Traction, etc., Co. v. Lee, Earw., 105, 111 (2).

13. *Instructions.—Omissions.—Cure by Other Instructions.*—Where the trial court, in stating the issues, did not refer to the subject-matter of the affirmative paragraphs of answer, but the principles of law applicable thereto were covered by other instructions, and no burden was placed upon defendants by the instructions to establish the allegations of the affirmative paragraphs of answer, defendants got the benefit of the principles of law applicable thereto, and the failure of the trial court to refer to the subject-matter of such answers was harmless.

Evansville, etc., R. Co. v. Scott, 121, 145 (13).

14. *Issues.—Instructions.*—Where an action for wrongful death of a pedestrian killed by an automobile was not presented or tried on the theory of the last clear chance doctrine, and there was no evidence tending to show antecedent lack of due care on the part of decedent and a subsequent chance on the part of defendant to avoid the injury notwithstanding such negligence, such theory was properly ignored in the instructions.

Indianapolis Traction, etc., Co. v. Lee, Earw., 105, 113 (3).

15. *Interrogatories.—Submission.—Refusal.*—Where interrogatories material to the issues involved are requested to be given in proper form at the proper time, and are not covered by other interrogatories, it is reversible error on the part of the trial court to refuse to submit them to the jury.

Evansville, etc., R. Co. v. Scott, 121, 143 (11).

III. VERDICT.

16. *Scope.*—The general verdict for plaintiff is a finding in his favor upon all the issues involved.

Evansville, etc., R. Co. v. Scott, 121, 142 (10).

IV. TRIAL BY COURT.

17. *Evidence.—Weight and Credibility.*—The trial court has the right to disregard evidence, though uncontradicted, if it considers such evidence unreasonable or inconsistent with facts and circumstances shown by the other evidence in the case.

Wm. P. Jungclauss Co. v. Rattl, 84, 89 (4).

18. *Evidence.—Consideration.—Weight and Credibility.*—Though plaintiff's evidence on an issue of fact was undisputed, the trial court had a right to consider all the other evidence in the case, including circumstances and surroundings, that in any way might affect the weight or credibility of such evidence.

Wm. P. Jungclauss Co. v. Rattl, 84, 88 (3).

19. *Finding of Facts.—Failure to Find Material Fact.—Effect.*—The failure to find a material ultimate fact is a finding against the party having the burden of proving such fact.

Hall v. Bauchert, 201, 207 (2).

20. *Finding of Fact.—Evidence.—Sufficiency.*—Where there is evidence tending to prove every material fact found by the trial court, the evidence is sufficient to sustain the findings of fact.

Keller v. Cox, 381, 387 (5).

21. *Special Findings.—Facts to Be Stated.—Ultimate Facts.—Inferences from Evidentiary Fact.*—A special finding should con-

TRIAL—Continued.

tain only the ultimate facts in issue, and not mere evidentiary facts, though the trial court may properly state, in its finding, any ultimate or inferential fact established by the evidence.

Keller v. Cox, 381, 387 (6).

22. *Special Findings.—Ultimate Facts.—Inferring from Evidence.*—Ultimate facts are inferred from evidentiary facts and circumstances, and are fully warranted where they may be reasonably inferred therefrom.

Keller v. Cox, 381, 387 (7).

23. *Special Findings.—Scope.—Evidentiary Facts.*—Only ultimate issuable facts should be stated in a special finding, and mere evidentiary facts have no bearing on the conclusions of law stated upon a finding of facts.

Diedrich v. Way, Admr., 375, 378 (1).

24. *Special Findings.—Failure to Find Essential Fact.—Effect.*—The failure of the court to find a material issuable fact is a finding against the party having the burden of proving the same.

Keller v. Cox, 381, 386 (2).

25. *Special Findings.—Failure to Find.—Effect.*—Where there was evidence tending to support the findings of the court for plaintiff, the failure of defendant to secure a finding of facts necessary to sustain his contentions is a finding against him as to those facts.

Bonevitz v. Kratz, 511, 520 (2).

26. *Special Findings.—Failure to Find.—Remedy.—Motion for New Trial.*—Where there is proof pertinent to an issue on which the court ought to have found facts which are not found, the remedy must be by a motion for a new trial on the ground that the finding is contrary to law, as a failure to find such facts thereby impliedly finds that they are not proved.

Reserve, etc., Ins. Co. v. Root, 448, 454 (3).

27. *Conclusions of Law.—Exception.—Effect.*—By excepting to a conclusion of law the party excepting admits that the facts within the issues relating thereto are fully and correctly found.

Hall v. Bauchert, 201, 207 (1).

28. *Conclusions of Law.—Sufficiency of Facts Found to Support.*—In an action to set aside a deed on the ground of fraud and undue influence, where the facts found showed neither fraud nor undue influence in procuring the conveyance, the conclusion of law that the deed should not be set aside was supported by the facts and was not erroneous because plaintiff impoverished herself by the conveyance, there being no finding of fact in reference thereto.

Keller v. Cox, 381, 386 (3).

29. *Exceptions to Conclusions of Law.—Effect.*—By excepting to the conclusions of law appellant concedes that the facts within the issues are fully and correctly found.

Keller v. Cox, 381, 385 (1).

TRUST COMPANIES—

Insolvency, effect as to commingled trust funds, see **BANKS AND BANKING**.

TRUSTEE—

In bankruptcy, title and possession of estate, see **BANKRUPTCY 2**.

VACATION—

Appeal, see **APPEAL 19**.

VENDOR AND PURCHASER—

See also **BROKERS**; **SALES**.

1. *Sales of Real Estate.—Excess Acreage.—Recovery For.*—There can be no recovery for excess acreage where land is sold in gross for a lump sum, except upon the ground of fraud or inequitable conduct.
McMahan v. Terkhorn, 501, 507 (2).
2. *Sales of Real Estate.—Excess Acreage.—Recovery For.—Mutual Mistake.*—A court of equity will allow compensation for excess acreage conveyed when there has been a mutual mistake in the conveyance and the transaction has been free from fraud where the parties have dealt in the belief that the tract of land conveyed contained a stipulated number of acres.
McMahan v. Terkhorn, 501, 508 (3).
3. *Sales of Real Estate.—Excess Acreage.—Recovery For.*—Although a sale of land was technically in gross, where the price was fixed on the basis of an incorrect estimate of the acreage made by a surveyor, which all the parties thought was correct and the price was reduced from that previously agreed upon when the parties correctly believed that the acreage was much greater than shown by the surveyor's estimate, equity will grant the vendor relief measured by the excess acres and the value thereof as expressed in the contract of sale on the basis of a sale by the acre, rescission being impossible because of the conveyance of part of the land by the purchaser.
McMahan v. Terkhorn, 501, 509 (4).

VERDICT—

See **TRIAL**.

Review, see **APPEAL** 58-66.

VESTED INTEREST—

Beneficiary of life policy, see **INSURANCE** 7.

WAIVER—

Of error, see **APPEAL** 89-93.

WATERS AND WATERCOURSES—

See also **DRAINS**; **RAILROADS** 1.

1. *Flood of River.—Act of God.—What Constitutes.*—In an action for damages to land due to the obstruction of flood waters of a river, the defense that the injury resulted from an "act of God" is available only when it appears that there is an entire exclusion of human agency from the cause that produced the injury, and an occurrence that is produced partially by the intervention of human agency is not an "act of God" within the meaning of the law.
Evansville, etc., R. Co. v. Scott, 121, 147 (16).

2. *Flood Waters.—Obstruction.—Negligence.—Liability.—Proximate Cause.*—In an action against a railroad company for dam-

WATERS AND WATERCOURSES—Continued.

ages resulting from the obstruction of flood waters of a stream, where the answers to interrogatories disclosed that various railroad embankments were flooded by the waters of a river, and several of them washed out, causing a rapid rise of flood water on the upper side of defendants' railroad embankment, together

with an accumulation of drift against the trestle work that formed the frame for the passageway for the water, the giving way of the embankments was not the proximate cause of injury to lands damaged by water being banked up by defendants' embankment and trestle, but intervening or concurring causes, so that defendant railroads were liable, since, to hold one liable for negligence, it is not necessary that the particular consequence of his act could have been anticipated by the exercise of ordinary care, it being sufficient if the probable injurious consequence could have been anticipated by reasonable care, and not the intervening agencies contributing to the result.

Evansville, etc., R. Co. v. Scott, 121, 140 (7).

3. *Streams.—Floods.—Act of God.*—Where the Wabash river overflowed its banks, as it was accustomed to do each year from time immemorial, and by reason of heavy rainfall and artificial drainage emptying into the stream it reached a stage of thirty-one feet above low-water mark six miles away from the locality in litigation, whereas the highest stage previously recorded was twenty-eight feet, thirty-eight years before, the flood was not of such extraordinary character that injury to farm lands from water backed up by a railroad embankment must be regarded as caused by an "act of God."

Evansville, etc., R. Co. v. Scott, 121, 141 (8).

4. *Streams.—Surface Water.—What Constitutes.*—Where a river overflowed by reason of heavy rainfall, as it was accustomed to do from time immemorial, and spread out over a vast area of low land adjacent to its ordinary channel, but the whole body of water moved in a current with the main channel, apparently with the same velocity and forming one continuous body of moving water, the flood waters were not surface waters, so that a railroad could not avoid liability for damages resulting from the obstruction of such water by its embankments and insufficient bridges.

Evansville, etc., R. Co. v. Scott, 121, 137 (6).

5. *Streams.—Characteristics.*—A stream or 'watercourse' must have a substantial existence, but it is not essential that it flow continuously throughout the year to be classified as such, the requirement being that it must have a bed and banks and that there is evidence of a permanent stream of running water.

Evansville, etc., R. Co. v. Scott, 121, 132 (5).

6. *Streams.—Obstruction of Flood Waters.—Damage to Land.—Liability.*—The injury to land due to the obstruction of flood waters of a stream by a railroad embankment was not one that was taken into account in measuring damage to the owner in a condemnation proceeding when the right of way was originally acquired, and such injury does not fall within the rule of law that there can be no recovery for injuries that are incident to the due and proper exercise of the corporate franchise of a railroad.

Evansville, etc., R. Co. v. Scott, 121, 150 (17).

7. *Surface Waters.—Right to Repel.*—As a general rule, on the boundaries of his own land, not interfering with any natural or prescriptive watercourse, the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing floods coming from or across adjacent lands, and he will not be responsible for consequent injury to the lands of others, but such waters as fall in rain and snow on his land, or come thereon by surface drainage from contiguous lands, he must keep within

WATERS AND WATERCOURSES.—Continued.

his boundaries, or permit them to flow off without artificial interference, unless within the limits of his land he can turn them into a natural watercourse.

Evansville, etc., R. Co. v. Scott, 121, 130 (4).

8. *Surface Water.—Obstruction.—Right of Railroads.*—Each proprietor of lands may protect himself against the flow of surface water, regardless of the effect it may have upon the lands of others, and, as this rule is applicable to railroads, they have the right to interfere with the flow of surface water in constructing and maintaining embankments upon their right of way as a part of the roadbed. *Evansville, etc., R. Co. v. Scott*, 121, 130 (3).

WILLS—

See also **DEEDS** 1, 2.

1. *Construction.—Estate Created.—Devise of Fee Simple.*—An item in a will devising "all my property both real and personal * * * to my beloved children * * * share and share alike and subject to the conditions hereinafter set out," is sufficient to devise a fee-simple title to one of testator's children.

Hall v. Bauchert, 201, 212 (4).

2. *Construction.—Vesting of Estates.*—Where a testator devised real and personal property to his two children and in a subsequent item provided that "In the event my son * * * shall die without issue living at the time of his death," his share should descend to the other child, the language used in such item had a fixed legal meaning, and referred to the death of the son within the lifetime of the testator.

Hall v. Bauchert, 201, 212 (5).

3. *Construction.—Estates Created.*—Under a will devising real and personal property to testator's two children and further providing that in the event the son "shall die without issue living at the time of his death," his share should descend to the other child, where the son survived the testator, but died intestate without children, his widow takes by inheritance the property devised.

Hall v. Bauchert, 201, 212 (6).

WITNESSES—

See also **EVIDENCE**; **TRIAL** 17, 18.

Credibility, jury question, see **APPEAL** 71.

1. *Competency.—Transaction with Deceased.—Statutes.*—In an action on a partnership note where the executrix of a deceased partner was substituted for him as a defendant, testimony of a surviving partner that he signed the firm name to the note by himself as manager, being directly antagonistic to his interest, was admissible under §526 Burns 1914, Acts 1883 p. 102, excepting from the provisions of §521 *et seq.* Burns 1914, §498 R. S. 1881, relating to the competency of witnesses to testify as to matters occurring during decedent's lifetime, a party adverse to the party calling him.

Reed, Exr., v. Farmers Bank, etc., 425, 432 (7).

2. *Impeachment.—Cross-Examination.*—Where, in an action for personal injuries, a witness on cross-examination denied that he had been indicted in another state for violation of liquor laws and the statutes regulating the sale of cigarettes to minors, he could not be impeached by evidence that he had been arraigned

WITNESSES—Continued.

on several indictments for such offenses, pleaded guilty and paid his fines, and by introducing certified copies of the court records of that state of such prosecutions, since, while a court may, in its discretion, permit a witness to be interrogated as to specific extraneous offenses and conduct calculated to degrade him, and thus impair his credibility as a witness, the party propounding the interrogatory is bound by the answer the witness gives, and will not be permitted to introduce substantive evidence to contradict it. *Evansville, etc., R. Co. v. Hoffman*, 571, 582 (14).

3. *Competency.—Transaction with Deceased.—Statute.*—In an action against a partnership on a firm note where the executrix of a deceased partner was substituted for him as a defendant, where, after one of the partners had identified an exhibit tending to prove the partnership and testified without objection that he and the deceased partner had signed it, the executrix objected on the ground that it was "an effort to prove a partnership existing between this defendant and another defendant which will affect the rights of the defendant administratrix, and for the reason that the evidence is incompetent" under §521 Burns 1914, §498 R. S. 1881, relating to competency of witnesses in suits in which an executor or administrator is a party, such objection was too late if directed to the identification of the instrument and untenable to the admission of the exhibit.

Reed, Eers., v. Farmers Bank, etc., 425, 431 (6).

WORDS AND PHRASES—

"Accident," construction, see **MASTER AND SERVANT** 36.

"Accident growing out of and in the course of the employment," construction, see **MASTER AND SERVANT** 40.

"Final judgment," see **APPEAL** 1, 2, 4-6.

"Legal heirs," meaning in policy, see **INSURANCE** 9.

WORKMEN'S COMPENSATION—

Proceedings before Industrial Board, rights and liabilities under act, etc., see **MASTER AND SERVANT** 23-46.





